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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

RONALD E. PAYNE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of Agriculture may be equitably estopped from enforcing a valid regulation establishing a deadline for filing of applications for Farmers Home Administration emergency loans on the ground that the agency's news release announcing the availability of loans did not specify the generous terms of the loan program.

PARTIES TO THE PROCEEDING

In addition to the Secretary of Agriculture, the Administrator of the Farmers Home Administration, the State Director and Assistant State Director of the agency's Florida office, the FmHA County Supervisor for Madison County, Florida, and a District Supervisor of the FmHA were defendants below and are petitioners in this Court.* In addition to Ronald E. Payne, Carbie Ellie was an individual plaintiff below and is a respondent in this Court. Payne and Ellie were certified as representatives of a class of farmers in a 13-county area of north Florida covered by presidential disaster declaration M-345 who suffered losses from floods or storms in early April 1973 and who were eligible to apply for emergency loans administered by the FmHA but were not so notified by the agency (App., *infra*, 43a).

In the district court, James H. Collins attempted to intervene as a plaintiff representing a class of farmers in 27 states and Puerto Rico who had suffered losses as a result of natural disasters occurring between December 27, 1972, and April 19, 1973, and who had been eligible to apply for emergency loans. Collins appealed unsuccessfully from the denial of his motion to intervene (App., *infra*, 24a-26a).

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*The complaint named various incumbent and past occupants of these offices as defendants in their individual capacities and sought damages from these defendants. The district court dismissed the claim for damages and no appeal was taken from that ruling. See App., *infra*, 3a n.7.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture, the Administrator of the Farmers Home Administration (FmHA), and FmHA officials in Florida, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 714 F.2d 1510. The supplemental opinion of the court of appeals on petition for rehearing (App., *infra*, 27a-30a) is reported at 721 F.2d 741. The opinion of the district court (App., *infra*, 31a-42a) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 62a-63a) was entered on September 19, 1983. The court of appeals' opinion on rehearing was entered on December 19, 1983. On March 9, 1984, Justice Powell extended the time for filing a petition for a writ of certiorari through April 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 4 and 10(c) of Pub. L. No. 93-237, 87 Stat. 1024-1025, Sections 1, 3, 4 and 8 of Pub. L. No. 93-24, 87 Stat. 24-25; and Section 5 of Pub. L. No. 92-385, 86 Stat. 557-559 are set forth at App., *infra*, 56a-61a. The applicable regulations, 7 C.F.R. 1832.81-1832.83 (1975), are set forth in pertinent part at App., *infra*, 49a-52a.

STATEMENT

The decision of the court of appeals requires the Secretary of Agriculture and the Farmers Home Administration to reopen an emergency farm loan program that expired more than 10 years ago.

1. a. For many years the Farmers Home Administration (FmHA) of the Department of Agriculture has administered a program of emergency loans designed to make possible continuation of farming operations by farmers who have suffered crop losses or property damage as a result of natural disasters such as floods, storms, or drought. See Consolidated Farm and Rural Development Act, §§ 321-330, 7 U.S.C. 1961-1971. From time to time Congress has adjusted the interest rates, credit conditions and forgiveness of indebtedness provisions of the emergency loan program. Generally,

however, if crop yields are substantially and adversely affected by a formally declared natural disaster and losses are not covered by insurance, an affected farmer may apply for an emergency loan. See generally 7 U.S.C. 1961; 7 C.F.R. Pt. 1945; 7 C.F.R. Pt. 1832 (1974).

b. In early April 1973, heavy rains caused flooding, crop losses and property damage in a 13-county area of northern Florida. On May 26, 1973, the President declared this region to be a major disaster area. Pursuant to Section 321 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1961, the Secretary then was authorized to make emergency loans to farmers suffering losses in the affected area. Under the terms of the emergency loan program in effect at the time of the disaster designation, emergency loans bore an interest rate of 5%, and applicants were required to show inability to obtain credit from ordinary commercial sources. See Pub. L. No. 93-24, §§ 3, 4, 87 Stat. 24-25. No provision was made for cancellation of any portion of the principal amount of the loan.[1] FmHA required applica-

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[1] By contrast, a different set of loan terms, much more generous to the borrower, had been in effect in 1972, pursuant to Section 5 of Pub. L. No. 92-385, 86 Stat. 557-558. Under the 1972 statute, emergency loans carried a 1% interest rate; eligibility was not conditioned upon unavailability of alternative sources of credit; and borrowers could have 50% of the loan principal, up to $5,000, cancelled at will.

Because the 1972 loan program triggered an unprecedented volume of loan applications, resulting in a severe drain on loan funds available to FmHA, the Secretary halted the making of emergency loans on December 27, 1972. In response, on April 20, 1973, Congress enacted Pub. L. No. 93-24, 87 Stat. 24. Section 1 of that Act repealed Section 5 of Pub. L. No. 92-385. Section 4 of Pub. L. No. 93-24 set an interest rate of 5% for new emergency loans. Section 3 imposed the requirement that credit be unavailable from alternative sources. A grandfather clause

tions for loans to cover crop losses to be filed within nine months of the formal disaster declaration. Thus, in the case of the north Florida floods of April 1973, applications were due no later than February 26, 1974. App., *infra*, 1a-3a. Apparently no loans were made in this area during this period (*id.* at 6a).

On January 2, 1974, however, Congress liberalized the terms and conditions for FmHA emergency loans with respect to natural disasters occurring between December 27, 1972, and April 20, 1973. The new law made available emergency loans bearing a 1% interest rate to eligible farmers who had suffered losses in this interval, authorized cancellation of 50% of the principal amount of indebtedness, up to $5,000, and dispensed with the requirement that applicants show the unavailability of credit from other sources. Pub. L. No. 93-237, § 4, 87 Stat. 1024.[2] Congress directed that the Secretary of Agriculture "extend for ninety days after the date of [the new] enactment" the otherwise applicable deadline for seeking emergency loan assistance, if the administrative deadline based on the date of the disaster declaration would have expired at an earlier date. Pub. L.

(§ 8, 87 Stat. 25) provided that loans to cover losses arising out of disasters declared prior to December 27, 1972, could still be sought under the 1972 loan program, if application was made within 18 days of the date of enactment—*i.e.*, by May 8, 1973. App., *infra*, 7a-9a, 14a n.24.

[2] Technically, Section 4 provided that notwithstanding the provisions of Pub. L. No. 93-24, which had phased out the more generous loan program that had been in effect in 1972 under Pub. L. No. 92-385, the 1972 loan program terms should remain available to farmers who suffered losses in natural disasters occurring between December 27, 1972, and April 20, 1973 (the date of enactment of Pub. L. No. 93-24). See page 3 note 1, *supra*.

93-237, § 10(c), 87 Stat. 1025; see S. Conf. Rep. 93-363, 93d Cong., 1st Sess. 6 (1973). The effect of this provision was to extend the deadline for north Florida farmers to apply for emergency loans from February 26, 1974, through April 2, 1974, and to make available more favorable loan terms than previously had been offered.

On February 15, 1974, FmHA issued instructions to its staff and rules to implement the special emergency loan program created by Pub. L. No. 93-237. Initially issued as staff Special Instruction 441.5 in unpublished form, the directive was published without material change in the Federal Register on February 27, 1974. 7 C.F.R. Pt. 1832, Subpt. E, at 39 Fed. Reg. 7569.[3] The Federal Register publication included all pertinent details concerning the terms and conditions of the special emergency loan program, including the April 2, 1974 application deadline, the 1% interest rate, the forgiveness provision, and the absence of any requirement that unavailability of other credit be demonstrated. 7 C.F.R. 1832.82(a) and 1832.83(a), at 39 Fed. Reg. 7570-7571 (App., *infra*, 51a-52a).

In addition, the agency's instructions stated:

> State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237. A suggested news release for local use is attached as Exhibit C.

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[3] Pertinent portions of special Instruction 441.5 as originally issued are reproduced at App., *infra*, 45a-46a. Pertinent portions of the provisions published in the Federal Register are reproduced at App., *infra*, 49a-52a.

App., *infra*, 46a, 51a.[4] The "suggested news release" was transmitted by the state FmHA director to local agency offices on February 28, 1974, and was in turn "forwarded to the local media" (*id.* at 7a).[5] The press release, which was carried in at least two newspapers in the north Florida disaster area (see Def. Exhs. 11A, 11B, C.A. App. 48a, 49a), advised farmers that they could apply for emergency loans from FmHA under Pub. L. No. 93-237 if they had suffered property or crop losses as a result of the April 1973 flooding, and that the application period would close on April 2, 1974. Only a handful of loan applications were received in this period (App., *infra*, 21a-22a).

2. Respondent Payne, a north Florida farmer, filed this action in the United States District Court for the Middle District of Florida on August 19, 1976. Although respondent Payne had received actual notice of the special 1974 emergency loan program, had applied for a loan, and had received one, he brought suit on behalf of a class of roughly 2500 farmers in the 13-county area covered by the May 26, 1973 disaster declaration who allegedly had been eligible for loans under the 1974 program. Contending that the class members had been denied property without due process by inadequacies in the publicity given to the special loan program and that

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[4] The reference to the suggested news release was not included in the Federal Register version of the publicity directive. The suggested news release itself is reproduced at App., *infra*, 47a. See also *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267, 1272 (9th Cir. 1981) (Boochever, J., concurring, quoting Special Instruction 441.5).

[5] The press release actually employed in Florida is reproduced at App., *infra*, 54a-55a. It is identical to the release attached to Special Instruction 441.5.

the FmHA had violated its own regulations governing publicity, respondent sought entry of an injunction directing that the 1974 loan program be reopened. C.A. App. 56a-61a.[6]

The district court certified a class consisting of all farmers in the 13-county area covered by the May 26, 1973 disaster declaration who suffered damages as a result of the natural disaster, were eligible to apply for emergency loans, and were not so notified (App., *infra*, 41a). In an opinion issued on February 11, 1981, the court held that the publicity given to the emergency loan program in 1973-1974 by the responsible FmHA offices did not satisfy the requirements of general agency publicity regulations, including a directive to make "such public announcements as appear appropriate" (7 C.F.R. 1832.3(a)(1) (1973)). App., *infra*, 39a-40a. Accordingly, the court enjoined FmHA to reopen the 1974 emergency loan program in the 1973 north Florida disaster area, directed the agency to give notice of the reopened program, and required it to process applications under the eligibility requirements prevailing in 1974 and to make loans upon the terms that were applicable in 1974 (*id.* at 40a-42a).[7]

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[6] Respondent also sought damages for himself against the named defendants in their individual capacities (C.A. App. 61a-67a). The district court dismissed the damages claim. Respondent appealed, but his appeal was dismissed because no order had been entered under Fed. R. Civ. P. 54(b). Respondent did not cross-appeal when a final judgment was ultimately entered. The court of appeals accordingly did not pass on the damages claim. App., *infra*, 3a n.7.

[7] The court of appeals stayed the judgment of the district court pending appeal (App., *infra*, 10a).

3. On appeal, the government argued that by mandating reopening of the long closed 1974 emergency loan program, in disregard for the applicable deadline established by law, the district court had impermissibly estopped the United States from enforcing lawful conditions upon the receipt of public benefits, contrary to *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *FCIC* v. *Merrill*, 332 U.S. 380 (1947). The government also argued that the publicity given to the 1973 and 1974 emergency loan programs in north Florida met any judicially enforceable legal requirements.[8]

The court of appeals affirmed (App., *infra*, 1a-26a). The court held that the publicity given to the special 1974 emergency loan program created by Pub. L. No. 93-237 in the north Florida disaster area was inadequate. The court reasoned that the press release disseminated by the state and local FmHA offices "failed to 'inform the news media . . . of the *provisions* of P.L. 93-237'" (App., *infra*, 22a (quoting 39 Fed. Reg. 7570; emphasis added by the court of appeals)) because it did not mention the reduced interest rate, the possibility of partial cancellation of the debt, or the waiver of any requirement that unavailability of alternative sources of

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[8] In addition, the government argued that respondent Payne, who had actual notice of the special 1974 loan program and had in fact applied for and received a loan, lacked standing to complain that the program publicity was inadequate and was not a proper representative of a class seeking reopening of the loan program. The court of appeals granted a limited remand requested by respondent. See App., *infra*, 10a n.19. On June 7, 1982, the district court entered an amended final judgment naming Carbie Ellie, a member of the class previously certified, as an additional representative plaintiff (*id.* at 43a-44a). The court of appeals concluded that these developments rendered the standing issue moot (*id.* at 10a n.19).

credit be demonstrated. The court thus concluded that the agency had failed to comply with its own publicity regulations governing the special 1974 emergency loan program (App., *infra*, 22a, 24a n.35).[9]

The court of appeals also rejected the government's contention that the district court lacked authority to require reopening of the 1974 loan program (App., *infra*, 11a-19a). Initially, the court of appeals held that Section 10(c) of Pub. L. No. 93-237 (see pages 4-5, *supra*) did not establish a statutory deadline for the filing of applications under the special 1974 emergency loan program. The court of appeals held that the statute merely mandated a minimum extension of administratively set deadlines, to ensure that those deadlines did not expire before eligible farmers had an opportunity to apply for assistance. The court concluded that the Secretary had authority to prescribe filing deadlines and could extend, or could be ordered to extend, the deadline for the 1974 loan program beyond April 2, 1974. App., *infra*, 13a-16a.

The court of appeals stated that it did not "condone the failure of potential loan applicants to follow legitimate time restrictions set as a prerequisite to applying for government benefits" (App., *infra*, 15a). In the court's view, however, FmHA's failure to give the special 1974 emergency loan program fuller publicity cre-

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[9] Because of this holding, the court of appeals did not reach the question whether, as the district court had held, the publicity provided failed to satisfy other requirements of FmHA regulations, such as the requirement for "such public announcements as appear appropriate" (see page 7, *supra*). The court also declined to decide whether the latter requirement is too amorphous to be judicially enforceable. App., *infra*, 22a.

ated "exigent circumstances beyond the farmers' control [that] precluded intended beneficiaries from applying for loans," and justified the district court's order that the agency "extend the loan period" (*id.* at 15a, 16a). Citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the court of appeals stated that reopening of the 1974 loan program was simply an application of the principle that agencies must abide by their own regulations (App., *infra*, at 16a, 18a-19a).

The court of appeals held that *Schweiker* v. *Hansen*, *supra*, did not prohibit the reopening of the special 1974 emergency loan program (App., *infra*, 16a-19a). The court's primary ground for distinguishing *Hansen* was that reopening the emergency loan program would "not threaten the public fisc" because "[l]oans * * * presumably are repaid" (App., *infra*, 18a). The court also reasoned that this case involved "failure on the part of an entire agency to follow self-imposed regulations" (*id.* at 17a), rather than a negligent act of an individual government employee (*id.* at 16a-17a).

4. The court of appeals issued a brief supplemental opinion in response to the government's petition for rehearing (App., *infra*, 27a-30a). The court stated that "while any language [in its opinion] categorizing" the FmHA's publicity directive "as a regulation may have been overbroad," the result reached was correct because the courts are authorized to compel agencies to comply with their "internal administrative procedures" (*id.* at 29a).

Upon application of petitioners, the court of appeals stayed issuance of its mandate pending final disposition of this petition.

REASONS FOR GRANTING THE PETITION

Overriding an explicit application deadline having the force and effect of law, the court of appeals has ordered the reopening of an emergency loan program designed to provide farmers with short-term financial relief from crop and property losses suffered more than a decade ago. The court of appeals' ruling conflicts with this Court's many decisions holding that, at least in the absence of serious affirmative misconduct, the government may not be equitably estopped from enforcing valid statutory or regulatory conditions of eligibility for receipt of public benefits. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 3-5; *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947).

Like *Community Health Services* v. *Califano*, 698 F.2d 615 (3d Cir. 1983), cert. granted, No. 83-56 (Oct. 3, 1983), the decision below disregards this Court's clear teaching that the courts may not invoke an equitable doctrine of estoppel to defeat conditions imposed on eligibility for payments from the federal fisc. See *Schweiker* v. *Hansen*, 450 U.S. at 788, 789 n.4; *FCIC* v. *Merrill*, 332 U.S. at 385. Here, as in *Community Health Services*, the court of appeals distinguished this Court's precedents on grounds that simply cannot withstand examination. In view of the pendency of *Community Health Services*, which is likely to provide substan-

tial guidance to the lower courts as to the applicability of equitable estoppel against the United States in circumstances akin to those of this case, we believe that it would be appropriate to hold this case for disposition in light of *Community Health Services*.[10]

1. a. The regulations that governed the special 1974 emergency loan program as it applied in north Florida unambiguously provided: "[T]he termination date for acceptance of applications based on both physical and production losses will be April 2, 1974" (7 C.F.R. 1832.82(a) (1975); see App., *infra*, 51a). Even assuming that Congress did not establish a statutory deadline for filing applications under the 1974 emergency loan program in Section 10(c) of Pub. L. No. 93-237 (see pages 4-5, *supra*), there can be no doubt that the deadline reflected in the regulation has the force and effect of law. Pursuant to Section 339 of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1989, the Secretary of Agriculture is authorized "to make such rules and regulations [and to] prescribe the terms and conditions for making * * * loans * * * as he deems necessary" to carry out the agricultural loan programs under his supervision. Thus the Secretary was vested with authority to adopt a deadline for filing of loan applications having legislative effect. See *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977). The Secretary explicitly invoked this substantive rulemaking authority in promulgating the regulation that contains the April 2, 1974 deadline. See 7 C.F.R. Pt. 1832, Subpart E (1975)

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[10] See also *Walters* v. *Home Savings & Loan Ass'n*, petition for cert. pending, No. 83-277 (filed Aug. 19, 1983). We are providing counsel for respondents with copies of our brief in *Community Health Services* and our petition in *Home Savings & Loan Ass'n*.

(App., *infra*, 50a). And the deadline regulation was promulgated as a substantive rule in accordance with the requirements of the Administrative Procedure Act.[11]

The April 2, 1974 deadline for filing of emergency loan applications accordingly has "the substantive characteristics" and is the "product of [the] procedural requisites" that vest a regulation with the "force and effect of law" (*Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979)). Indeed, the court of appeals seemed to acknowledge as much, describing the deadline as a "legitimate time restriction[ ] set as a prerequisite to applying for governmental benefits" (App., *infra*, 15a). Yet the court of appeals unaccountably failed to recognize that *Schweiker* v. *Hansen* controls this situation. Here, as in *Hansen*, 450 U.S. at 790, "Congress * * * delegated to [the Secretary] the task of providing by regulation the requisite manner of application" for a government benefit. And here, just as there, a "court is no more authorized to overlook the valid regulation [governing] applications * * * than it is to overlook any other valid requirement for the receipt of benefits" (*ibid.*). See also *FCIC* v. *Merrill*, 332 U.S. at 384-385.

b. The grounds on which the court of appeals distinguished *Hansen* are insubstantial. The primary distinction, in the court of appeals' view, was that, because a

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[11] Pursuant to 5 U.S.C. 553(b)(B) and 553(d)(3), the agency dispensed with notice and comment and made the regulations immediately effective for good cause, explaining that such action was necessary to "implement[ ] the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest." 39 Fed. Reg. 7569 (1974) (App., *infra*, 49a).

loan program is involved here, "the district court's remedy in the present case does not threaten the public fisc" (App., *infra*, 18a). This Court has previously rejected such reasoning, holding that the rule against estopping the government from insisting on compliance with valid conditions imposed on receipt of a public benefit does not depend upon a showing of impact on the federal treasury. See, *e.g.*, *INS* v. *Miranda*, *supra*; *INS* v. *Hibi*, *supra*; *Montana* v. *Kennedy*, *supra*. In *Miranda*, the court of appeals had distinguished *Schweiker* v. *Hansen* on precisely the ground offered by the court below. See *Miranda* v. *INS*, 673 F.2d 1105, 1106 (9th Cir. 1982). This Court responded (slip op. 5):

> The * * * distinction drawn by the Court of Appeals between this case and *Hansen* is unpersuasive. It is true that *Hansen* relied upon a line of cases involving claims against the public treasury. But there was no indication that the Government would be estopped in the absence of the potential burden on the fisc.

In any event, the court of appeals' suggestion that reopening the 1974 special emergency loan program will produce no drain upon the public treasury is factually incorrect. First, as indicated above, the terms of the loan program included forgiveness of 50% of the borrower's debt, up to $5,000. Accordingly, each loan issued under the reopened program is, in effect, a grant of $5,000. Extending such relief to the estimated 2500 members of the class certified in this case would cost the government $12.5 million dollars in direct outlays. See also pages 21-22, *infra*. Second, in light of prevailing interest rates, a substantial subsidy is reflected in the 1% interest rate applicable to loans under the 1974

program. The attractiveness of these "loan" terms assures that the reopening of the program will impose substantial costs upon federal taxpayers. Thus the court of appeals' decision disregards "the duty of all courts to observe the conditions defined by Congress for charging the public treasury" (*FCIC* v. *Merrill*, 332 U.S. at 385).

The court of appeals also reasoned that the government could be estopped here because this case involves "failure on the part of an entire agency to follow self-imposed regulations" rather than negligence by a single employee (App., *infra*, 17a). But the rule against estoppel in government cases is not limited to situations in which an individual employee acts in a manner that adversely affects the interests of an applicant for a benefit. For instance, the delay in processing a petition for adjustment of immigration status at issue in *INS* v. *Miranda* was not attributed to any employee's conduct, but was assessed on the premise that it was the act of the Immigration and Naturalization Service as a whole. Slip op. 4 & n.3. Similarly, the suspension within the Philippines of a special overseas naturalization program in *INS* v. *Hibi* was ordered by the Attorney General, in consultation with the Commissioner of Immigration, and reflected the official uniformly applied policy of the United States. See 414 U.S. at 10-11 (Douglas, J., dissenting); see also *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 2. Nonetheless, estoppel was rejected in these cases, and there is no justification for a different result here.[12]

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[12] We note that the court of appeals' attempted distinction of *Hansen* is inconsistent with other aspects of its reasoning. If,

Finally, the court of appeals distinguished *Hansen* on the ground that the erroneous advice of a Social Security Administration employee was "revocable," whereas respondents cannot now obtain loans under the 1974 emergency program because the application period has closed (App., *infra*, 17a-18a). The court of appeals misapprehended the thrust of the Court's statement in *Hansen* (450 U.S. at 789) that the SSA employee's conduct "did not cause the respondent to take action, cf. *Federal Crop Insurance Corp.* v. *Merrill*, *supra*, or fail to take action, cf. *Montana* v. *Kennedy*, *supra*, that respondent could not correct at any time." The Court could not have meant that the Social Security applicant's action in the wake of receiving erroneous advice had no irreversible impact upon her ability to receive benefits. In fact, although Hansen ultimately did apply for and receive Social Security benefits, because the Act limited the reach of the retroactive award of benefits to a 12-month period, she did not receive all of the benefits she might have received absent the erroneous advice. 450 U.S. at 786-787. Rather, the Court's observation indicated only that the conduct of the SSA employee did not prevent Hansen from filing an application for benefits that would have protected her rights to the extent permitted by the applicable time constraints established by law. In short, the rule reflected

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as the court of appeals concluded, publicity measures in the 1973 north Florida disaster area were insufficient because they did not comport with the agency's self-imposed publicity requirements, the error cannot be attributed to the entire agency. In any event, a rule conditioning the availability of estoppel upon the level of the agency hierarchy at which the challenged agency action was authorized would be both inconsistent with *Hibi* and unworkable in practice.

in *Hansen* is that the courts may *not* disregard lawfully established deadlines for applying for federal benefits.[13] Because FmHA's failure to publicize fully the terms of loans available under the special 1974 program did not prevent respondents from applying for loans prior to the deadline, *Hansen* is controlling here. The FmHA's conduct "did not cause respondent[s] to take action" or "fail to take action" that respondents "could not correct at any time" permitted by law (450 U.S. at 789).

In sum, this Court's decisions make clear that, at least in the absence of serious affirmative misconduct, the government may not be estopped from enforcing the requirements of public law. See *INS* v. *Miranda*, slip op. 3-4; *Schweiker* v. *Hansen*, 450 U.S. at 788-790; *INS* v. *Hibi*, 414 U.S. at 8-9; *Montana* v. *Kennedy*, 366 U.S. at 315. Yet the court of appeals expressly declined to rest its decision upon a finding of affirmative misconduct (App., *infra*, 18a n.29), correctly recognizing that the case at most involved a failure to act, or "neglect" (*ibid.*; *id.* at 16a). Plainly, a mere failure to follow "affirmatively required procedure" (*id.* at 16a) is not the kind of misconduct that would "raise a serious question whether petitioner is estopped from insisting upon compliance with [a] valid regulation" (*Schweiker* v. *Hansen*, 450 U.S. at 790).

c. The court of appeals perceived the reopening of the 1974 special emergency loan program in the 1973 north Florida disaster area as a routine exercise of judi-

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[13] As the Court's citation (450 U.S. at 789) of *FCIC* v. *Merrill* and *Montana* v. *Kennedy* indicates, it is not a requirement of the rule prohibiting estoppel that private action taken in the wake of an agency error be even partially reversible. See also *INS* v. *Hibi*, *supra*.

cial authority under the Administrative Procedure Act to require an agency to abide by its own regulations (App., *infra*, 10a-11a n.20, 16a, 18a). Assuming that the APA is applicable here, the doctrine invoked by the court of appeals still does not support its decision.[14]

To be sure, the Court has held that "agencies [are] bound by their own regulations * * * in cases * * * brought under the APA" or in similar settings. *United States* v. *Caceres*, 440 U.S. 741, 751 n.14, 754 (1979) (footnote omitted).[15] The question in this case, however, is not whether the Secretary could be directed by a court to carry out his own publicity directive (at a time when the program was still in effect), but whether the courts below had authority to reopen the loan program, which had, by its terms, expired. None of this Court's decisions requiring an agency to abide by its

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[14] In fact, this suit cannot plausibly be described as one for judicial review of agency action pursuant to 5 U.S.C. 702. Respondent Payne sought and received a loan under the 1974 emergency loan program (see page 8 note 8, *supra*). With that single exception, there is no allegation that either the other representative plaintiff or any member of the class has ever applied—even tardily—to the FmHA for a loan under the program. Nor has any respondent otherwise requested that the agency waive the April 2, 1974 loan application deadline. This is not a mere failure to exhaust rights of administrative appeal. Respondents simply have not at any point been subjected to reviewable agency action. See *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). As a result, there is no record on which the court of appeals could have determined the reasonableness of agency action.

[15] See, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S.. 535, 539-540 (1959); see also *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954); but see *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970).

regulations suggests that relief of the latter kind is permissible—*i.e.*, that a court may disregard valid limitations upon eligibility for benefits because of agency violations of self-imposed regulations unrelated to the eligibility limitations. Rather, in each of these cases, the agency had sought to deny an individual a benefit to which he was entitled by law, or to deprive a person of a position lawfully occupied, in a procedurally irregular manner; the relief sought was simply the setting aside of that agency action.[16]

The relief awarded in this case by the district court simply does not resemble that made available in prior cases and is not authorized by the APA. To reopen a long expired emergency loan program, in the face of a valid regulation establishing a deadline for filing of applications, because of a finding of noncompliance with unrelated agency requirements covering the program is not to "compel agency action unlawfully withheld" (5 U.S.C. 706(1)). Under the cited grant of authority a court might well have enjoined the FmHA to comply with its own publicity directives.[17] But the relief

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[16] In *Morton* v. *Ruiz* the agency had denied benefits to an applicant on the basis of a regulation that was defectively promulgated. The Court declined to accord legislative effect to the regulation because the Administrative Procedure Act itself specifies the sanction of unenforceability for such regulations. See 415 U.S. at 231-235.

[17] We do not concede, of course, that the publicity given to the 1974 special emergency loan program in the north Florida disaster area failed to comport with the agency's own publicity requirements. First, the court of appeals overlooked the fact that Pub. L. No. 93-237 covered a host of subjects unrelated to the 1974 loan program. The relevant provision, Section 4, simply revived, temporarily, a program that had previously been in effect in 1972. See page 4 & note 2, *supra*. Neither the interest

awarded here is not of that nature. Reopening the loan program also is not "invalidation of agency action that is arbitrary, capricious, an abuse of discretion, * * * not in accordance with law * * * or taken 'without observance of procedure required by law'" (*United States* v. *Caceres*, 440 U.S. at 753-754 (quoting 5 U.S.C. 706(2)). Indeed, there is no suggestion here that the agency's regulation establishing the April 2, 1974 deadline was deficient in any of these respects when adopted. Instead, the court of appeals appears to have concluded (App., *infra*, 15a-16a) that, in light of subse-

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rate applicable to that program nor the cancellation provisions are even mentioned in Pub. L. No. 93-237. In the circumstances, the press release, which mentioned the availability of a new loan program and the pertinent deadline and advised interested persons as to how to secure more information, was entirely consistent with the publicity directive requiring that the local media be advised of "the provisions of P.L. 93-237."

Moreover, in determining whether an agency has violated its own regulations, substantial deference should be accorded to the agency's contemporaneous interpretation of the requirements in issue. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In this case it is demonstrable, virtually to a certainty, that the agency's publicity directive was not intended to require that the details of the loan terms be disseminated through the media. As indicated above (pages 5-6 & notes 3-5), this directive was originally accompanied by a suggested news release, which was the very release actually employed in north Florida. The suggested release obviously reflects the agency's understanding of the publicity requirement. The finding of agency noncompliance with its own regulations is thus untenable. Commenting on essentially identical facts in *Emergency Disaster Loan Ass'n, Inc.*, v. *Block*, 653 F.2d 1267 (9th Cir. 1981), Judge Boochever stated (*id.* at 1272 (concurring opinion)):

> While that release did not set forth some of the material provisions of the new law, it is not disputed that the state officials sent out news releases embodying the provisions of the suggested one. There was thus substantial compliance with the directive.

quent developments, it was unreasonable for the agency to fail to waive its own deadline, and that a court therefore could direct it to do so.[18]

This reasoning is fundamentally at odds with *Schweiker* v. *Hansen* and *FCIC* v. *Merrill*. Applying the reasoning of the decision below, this Court should have held in *Hansen* that the Social Security Administration acted unreasonably in refusing to waive the written application requirement established by agency rules, in light of its employee's violation of the SSA Claims Manual. And the Court should have held in *Merrill* that the Federal Crop Insurance Corporation was required to waive the provisions of its regulations precluding issuance of insurance upon crops planted on reseeded acreage, in light of its employee's failure to give correct advice. These were not the rulings of this Court. Accordingly, the authority available to a court under the APA to set aside agency action does not extend to preventing the government from enforcing a lawful condition upon the receipt of federal benefits. This Court's pronouncements regarding estoppel of the government may not be so easily circumvented.

2. a. The decision of the court of appeals predictably will trigger a flood of applications from farmers primarily interested in obtaining a $5,000 grant and/or a loan at interest rates far below those otherwise available. As we have noted, the result will be costly indeed for the United States. Furthermore, the cost will be greatly magnified if the unsuccessful intervenor in this

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[18] As noted earlier (see page 18 note 14, *supra*), the court of appeals overlooked the fact that none of the respondents had even asked the agency to waive or extend the application deadline.

case succeeds in extending the court of appeals' ruling to benefit a nationwide class in his separate action pending in district court in Georgia (see page II, *supra;* App., *infra,* 24a-26a & n.42).

Reopening the 1974 special emergency loan program will also produce substantial administrative costs and burdens. It plainly will be difficult to determine at this late date whether any individual applicant suffered losses in 1973 and what the extent of those losses were. The filing deadline overridden by the court of appeals thus is, like the written application requirement that the Court vindicated in *Hansen,* 450 U.S. at 790, "essential to the honest and effective administration" of the program.

Reopening the 1974 loan program a decade after its expiration will not even serve the objectives of that program. Those objectives were to tide farmers over from the immediate shock of losses from natural disasters, "in order that they may continue their future farming or livestock operations with credit from other sources" (7 C.F.R. 1832.81 (1975) (App., *infra,* 50a-51a)). The judgment of the district court, as affirmed by the court of appeals, however, requires that loans be made under the reopened program based upon the applicant's eligibility as of 1974, without regard to whether any current need exists. And any current need that might exist in a particular case cannot realistically be traced to the 1973 north Florida flooding. Accordingly, the remedy afforded by the court of appeals resembles nothing so much as an unauthorized award of damages against the United States. See *United States* v. *Testan,* 424 U.S. 392, 400 (1976).

b. The court of appeals' ruling typifies the increasing tendency of the lower courts to disregard this Court's decisions establishing that the government may not be equitably estopped from enforcing a valid statute or regulation. In *Heckler* v. *Community Health Services*, No. 83-56 (argued Feb. 27, 1984), the Court is considering another example of this trend, a decision by the United States Court of Appeals for the Third Circuit estopping the Secretary of Health and Human Services from recovering excess payments made to a health services provider under the Medicare program. Because the decision in *Community Health Services* may well clarify the principles that govern this case, we believe it would be appropriate for the Court to hold this case pending the disposition of *Community Health Services*.

CONCLUSION

The petition for a writ of certiorari should be held pending a decision in *Heckler* v. *Community Health Services*, No. 83-56, and disposed of as appropriate in light of that decision.

Respectfully submitted.

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APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 81-5365

RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

JOHN R. BLOCK, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS.

v.

JAMES J. COLLINS, MOVANT-APPELLANT-INTERVENOR

Appeals from the United States District Court for the Middle District of Florida

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SEPT. 19, 1983

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Beginning about April 1, 1973, thirteen north Florida counties received a series of torrential rains resulting in flooding, crop damage, and property damage.[1] Pursu-

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[1] The counties involved were Baker, Columbia, Dixie, Gilchrist, Hamilton, Jefferson, Lafayette, Leon, Levy, Madison, Nassau, Suwannee, and Wakulla. 39 Fed.Reg. 14800 (1973).

ant to the Disaster Relief Act of 1970,[2] the President, on May 26, 1973, declared the aforementioned area a major disaster area.[3] 38 Fed.Reg. 14800 (1973). The Farmers Home Administration (FmHA) was authorized and funded by the Consolidated Farm and Rural Development Act, 7 U.S.C. sections 1961-69, to make emergency loans in this thirteen-county area.[4] Originally the application period for production losses was nine months (ending February 26, 1974) and for property damage was sixty days (ending July 30, 1973). Apparently, crop losses are allowed a longer filing period because of the inability to determine the extent of loss prior to harvest and sale. The initial terms of the emer-

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[2] Pub.L. No. 91-606, 84 Stat. 1744 (1970) (repealed or transferred 1974).

[3] Emergency Loan Major Disaster Designation M345. Plaintiffs' Exhibit 8A. A presidentially declared disaster was normally coordinated by the Office of Emergency Planning (OEP). Record Vol. 10 at 1072. (OEP is also referred to as the Office of Emergency Preparedness.)

[4] The Act provides:

> (b) The Secretary shall make loans in any such area designated by the Secretary in accordance with subsection (a) of this section and in any area designated as a major disaster by the President pursuant to the provisions of the Disaster Relief Act of 1970, as amended, (1) to established farmers, ranchers, or oyster planters who are citizens of the United States and (2) to private domestic corporations or partnerships engaged primarily in farming, ranching, or oyster planting: *Provided*, That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan, and are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

Pub.L. No. 87-128, 75 Stat. 311 (codified as amended at 7 U.S.C. sec. 1961(b) (1973)).

gency loans included a 5% per annum interest rate and a provision requiring applicants to show an inability to obtain credit from commercial lenders.[5]

Ronald E. Payne, a farmer in one of the designated counties, brought a class action suit against the FmHA, United States Department of Agriculture, seeking injunctive relief to secure for himself and all similarly situated farmers in the area the right to apply for emergency loans.[6] Plaintiffs alleged inadequate notice of the availability of loans due to FmHA's failure to adhere to its own regulations providing for appropriate notice.[7]

The applicable FmHA regulations in effect during this initial loan application period included provisions prescribing notice of the availability of loans to eligible area farmers. The Code of Federal Regulations contained the following section:

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[5] Pub.L. No. 93-24, sections 3, 4, 87 Stat. 24 (codified as amended at 7 U.S.C. sections 1961(b), 1964 (1973)).

[6] The original class was recertified as:

> All farmers in the thirteen county area covered by the Disaster Declaration M-345 who: 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 26, 1973; and who 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration pursuant to 7 C.F.R. sec. 1832 (1974), and 3) who were not notified that they were eligible to apply for emergency loans.

Record Vol. 3 at 114.

[7] The complaint as originally filed contained an action for money damages. Record Vol. 1 at 1. The district court dismissed that count, and plaintiff appealed. Record Vol. 1 at 50, 56. The appellate court dismissed the appeal for lack of a Rule 54(b) order. Record Vol. 1 at 59. Plaintiff did not file a new notice of appeal (cross-appeal) following final judgment in this case, and, thus, that count is not before us.

> (a) [T]he State Director [of the FmHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under sec. 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the USDA Defense Board Chairman and will make such public announcements as appear appropriate.
>
> (1) Immediately upon receiving notice about the counties under this jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under sec. 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program.

7 C.F.R. sec. 1832.3(a)(1) (1973). The alleged failure of the agency to comply with the regulation is the gravamen of the original complaint.

Regarding announcement of the availability of emergency loans in designated disaster areas, Claude Greene, State Director of FmHA, issued notification to all county supervisors in the affected area.[8] On June 4, 1973, Greene also sent a sample press release to the county supervisors with instructions to "use it as soon as possible." The release stated that applications should be submitted prior to July 30, 1973; it totally omitted any reference to the nine-month period, expiring February 26, 1974, in which to apply for production losses. The release was routinely forwarded to the local media.

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[8] Greene sent a letter dated May 31, 1973 to the county supervisors. Plaintiffs' Exhibit 8. The letter briefly outlined emergency loan availability.

However, county officials made no follow-up to determine whether the press release was published. Several newspapers carried information concerning the FmHA program, but only one printed the release in full and others contained erroneous information in addition to omitting notice of the longer application period for crop loans.

The President's Office of Emergency Preparedness coordinated a week-long public meeting at the Live Oak, Florida, Coliseum in early June 1973. Various government agencies set up booths each manned by an agency representative for the purpose of supplying information regarding the available disaster relief programs.[9] The FmHA booth was manned by an agency representative for a short period of time and by a volunteer the remaining time. Apparently, the volunteer was without knowledge of or familiarity with FmHA programs generally or this emergency program specifically. Several farmers attending the the meeting testified that they were told no relief was available for farmers who had sustained crop losses but only for those

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[9] The agencies involved included the four agencies within the Department of Agriculture—FmHA, Soil Conservation Service, Agricultural Stabilization and Conservation Service, and Extension Service. FmHA functions as a credit agency for farmers. Soil Conservation Service provides technical assistance to farmers in developing conservation services or practices. Agricultural Stabilization and Conservation Service makes grants for conservation practices and controls production of controlled crops. Extension Service subsidizes the state agricultural service which provides technical and informational services to farmers. Representatives from these agencies comprise the USDA Defense Board which functions to provide information and coordinate USDA programs in times of emergencies. *See generally* Record Vol. 5 at 134-37.

who had sustained damage to their homes. Record Vol. 5 at 207, 228, 267-68; Vol. 8 at 589. Moreover, testimony indicated that FmHA officials were aware of the losses suffered as a result of the flooding. Record Vol. 8 at 684-86. The FmHA maintains that handout materials about the emergency loans and application forms were available at the meeting. However, the FmHA processed no applications and granted no emergency loans in this thirteen-county area during the 1973 loan period.

The government contends that no loans were made during this period because of credit available elsewhere. However, many of these lenders, such as the Small Business Administration, did not extend loans for *crop* losses. Record Vol. 10 at 1071. The government also asserts that the actual damage sustained by area farmers was much less than originally estimated.

On January 2, 1974, the President of the United States signed Public Law No. 93-237,[10] which extended the application period for emergency loans to April 2, 1974. The new law provided for more attractive loan terms [the interest rate was dropped to 1% and the first $5,000 was forgiven] and eliminated the requirement that loan applicants be unable to obtain sufficient credit elsewhere. Notice of the reopened application period was not published in the Federal Register until February 27, 1974, so that two-thirds of the extended application period had expired.[11] The regulations provided that the county supervisor was to prepare a list of paid-up and indebted borrowers who had received emergency loans, notify each person on the list of the

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[10] 87 Stat. 1023 (1974).

[11] 39 Fed.Reg. 7569 (1974).

new terms, and determine if that person was eligible for any benefit under the new terms of the loan. Since no one filed an emergency loan application during the first application period, no letters were sent.

The new regulation also stated that "State Directors will issue an instruction setting forth this information [regarding Public Law No. 93-237] for use in their respective states. State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237." 39 Fed.Reg. 7570 (1974). On February 28, 1974, the state director issued a memorandum and sample press release to all county supervisors.[12] The sample press release stated that loan applications would be taken under the terms of the new law. Contrary to the mandate of the regulation, the release did not recite the terms of Public Law No. 93-237. The press release was routinely forwarded to the local media but received little publication. No other efforts at notification were undertaken.[13] Only three or four loans were granted during this second period. Plaintiffs attack the agency's failure to comply with this regulation as the second prong of their inadequate notice argument.

Inquiring into possible reasons or motivations for this failure to provide notice and, thus, ultimately to grant loans, we are acutely aware of the historical background of the case. The political climate of the early 1970s was one of considerable struggle between the ex-

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[12] Plaintiffs' Exhibit 21.

[13] The complaint refers to a one-day public meeting in Suwannee County on or around March 14, 1974. Complaint ¶ 15.

ecutive and legislative branches of government. Congress appropriated monies for various programs and the executive branch refused to spend the funds on those it considered unwise. Several impoundment cases arose,[14] hearings were held,[15] and statutes were passed.[16] As indicated earlier, in the area of agriculture Congress had passed very generous loan legislation. Pub.L. No. 92-385, 86 Stat. 554 (1972). The Secretary of Agriculture, however, by administrative fiat curtailed the grant of these loans. Injured farmers in Minnesota filed suit against the Secretary of Agriculture seeking reinstatement of the program. They alleged that the Secretary acted unlawfully and beyond the scope of his authority in terminating the FmHA emergency loan program. The district court agreed, finding the Secretary's action in violation of applicable statutes, departmental regulations, and due process of law. *Berends* v. *Butz*, 357 F.Supp. 143 (D.Minn.1973).

At the congressional hearings on Impoundment of Appropriated Funds by the President, then-Secretary Butz testified that in an effort to reduce spending his agency examined existing programs and withheld funds

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[14] *E.g.*, *Train* v. *City of New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975); *Berends* v. *Butz*, 357 F.Supp. 143 (D.Minn.1973).

[15] *E.g.*, Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973).

[16] Congressional Budget and Impoundment Control Act of 1974, Pub.L. No. 93-344, 88 Stat. 298 (codified as amended at 2 U.S.C. sec. 621 *et seq.* (1983)).

from those it found "least essential."[17] The decisions were made on the basis of "subjective judgment."[18] In response to the "termination" of the emergency loan program and in order to assure reinstatement of the program, Congress repealed 92-385 to the extent of its generous loan terms. Pub.L. No. 93-24, 87 Stat. 24 (1973). Congress also provided for the applicability of the terms of 92-385 to previously declared disasters. *Id.*; Pub.L. No. 93-237, sec. 4, 87 Stat. 1023 (1974). In an apparent attempt to persist in executive budgetary goals, the agency then merely withheld appropriate notice of the loan program.

Following a bench trial in the instant case, the district court issued an order and opinion on February 11, 1981 finding that the notice of the emergency loan program was insufficient to comport with the applicable regulations providing that the state director and county supervisors "make such public announcements as appear appropriate." 7 C.F.R. sec. 1832.3(a)(1) (1973). The district court also found that specific types of notice provided for in the regulations were not effectuated. *Id.* Judgment was entered for the plaintiff and the recertified class with the court ordering the FmHA to reopen the 1973-74 emergency loan program in the designated counties and the parties to submit a plan for notification of class members. A plan was submitted and accepted, and the district court denied defendants'

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[17] Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 532 (1973).

[18] *Id.* at 554.

motion for suspension of injunction pending appeal. Defendants filed an appeal and ultimately obtained in this court a stay of the injunction pending appeal in this court. An amended final judgment adding a second class representative as party plaintiff was later entered.[19] Record Supp. Vol. 1 at 4.

On appeal, the government contests the authority of the district court to reopen the emergency loan program and contends that the original public notice was sufficient. Upon review of these issues and the evidence presented, we affirm the district court.[20]

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[19] During trial, plaintiff moved to add six parties plaintiff. Record Vol. 3 at 102 and Vol. 8 at 772-75. The district court stated that the motion would be granted. Record Vol. 10 at 1203. The final judgment, however, mentioned only Payne and the recertified class. Record Vol. 3 at 114.

Originally, appellant maintained plaintiff Ronald Payne's lack of standing to challenge the adequacy of notice and seek reopening of the loan program. *See* Brief for Appellant at 24-26. Appellant reasoned that because Payne had actual notice of the FmHA program and received a loan thereunder (*see* Complaint ¶¶ 14, 23, 25-32), he could demonstrate no injury in fact.

Plaintiffs then sought a limited remand for the purpose of entering an amended final judgment. This court granted appellees' motion for limited remand, Record Supp. Vol. 1 at 3, and the district court entered an amended final judgment adding a second named class representative to the list of prevailing plaintiffs. Record Supp. Vol. 1 at 4-5. Thus, we find the standing issue moot. (We note that the government apparently abandoned the standing issue. The government's reply brief on this issue placed great emphasis on the fact that at that time the parties seeking to intervene as named representatives had not sought to have the court amend its judgment to include them. The standing issue was not mentioned at oral argument.)

[20] We accept jurisdiction pursuant to 28 U.S.C. sec. 1291. The scope of our review is set out in Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 701 *et seq.* Section 706 provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

Propriety of the District Court Remedy[21]

The government's primary position in this case is that the 90-day extension of Public Law No. 93-237 constitutes a legislatively enacted termination date of the benefits of 93-237 and as such deprives the agency of the authority to reopen the loan application process. Thus, assuming a failure to notify, the agency is left in the absurd position of arguing that it can disobey a congressional mandate to make loans available to eligible farmers but has no authority to make the loans in cases of inadequate notice of availability because Congress did not mandate an extension of time for those cases. The government maintains that since the statutory deadline for seeking assistance has long since expired, no statutory authority exists, as is needed, for making emergency loans under the terms of that program at this time. The government does not contend that *funds*

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law, interpret constitutional and statutory provisions, and determine the meaning of [sic] applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

5 U.S.C.A. sec. 706 (1977).

[21] This issue presupposes inadequacy of notice and goes only to the *remedy*. The issue of notice is discussed *infra*.

are no longer available for these emergency loans,[22] just that no *authority* exists to expend them for this disaster absent a timely filed application.

The government's initial brief chiefly relied on the Ninth Circuit's decision in *Emergency Disaster Loan Association, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir.1981). Although based upon a similar factual setting, we find the case inapposite. The Ninth Circuit case failed to consider the regulation published on February 27, 1974 requiring notice to prior applicants and the news media. The court considered only an earlier internal Special Instruction which embodied the same terms but, as such, was found to be discretionary. As was apparently the case in the Ninth Circuit, the government in this case failed to bring to our attention the notice provision in the above-mentioned regulation. The government's reply brief, however, did footnote the error contained in its main brief. An additional distinction between the Ninth Circuit case and the instant one is that there the plaintiffs sought mandamus. The Ninth Circuit denied that relief since the instruction was discretionary and thus unenforceable in an action for man-

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[22] Originally, the Emergency Credit Revolving Fund was established for carrying out the purposes of the Consolidated Farm and Rural Development Act. 7 U.S.C. sec. 1966 (1973). That fund was later abolished and its assets, liabilities, and authorizations transferred to the Agricultural Credit Insurance Fund, also a revolving fund. 7 U.S.C. sec. 1929(g)(1) (1973). *See also* Record Vol. 5 at 119-121. *See generally Berends* v. *Butz*, 357 F.Supp. 143, 155-56 (D.Minn.1973). In *Berends*, Minnesota farmers sought reinstatement of the administratively curtailed national emergency loan program. The court discussed the revolving loan fund and rejected the government's assertion of shortage of funds as justification for termination of the program.

damus. *See generally United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420, 51 S.Ct. 502, 504, 75 L.Ed. 1148 (1931).

Traditionally, the Secretary of Agriculture declared as a matter of policy the duration of application periods for emergency loans.[23] Public Law 93-237 maintained that policy, *see* 39 Fed.Reg. 7570 (1974) ("Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses)."), but provided that for "all disasters occurring on or after December 27, 1972, the Secretary of Agriculture shall extend for ninety days after the date of enactment of this [statute] the deadline for seeking assistance under ... the Consolidated Farm and Rural Development Act." Public Law No. 93-237, sec. 10(c), 87 Stat. 1023 (1974). Thus, an extended termination date of April 2, 1974 was set for the acceptance of applications for all losses resulting from the instant disaster. 39 Fed.Reg. 7570 (1974).

This "statutory" reopening of the application period was a result of contemporary changes in the disaster relief laws which caused public uncertainty as to the

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[23] The 60-day time limit is a commonly used application period. The Small Business Administration (SBA), an agency also participating in disaster relief loans, used a 60-day deadline. Record Vol. 10 at 1081-82. SBA's district director testified that his agency could extend the filing period. *Id.* FmHA's nine-month application period for production losses was apparently made pursuant to a verbal agreement between FmHA and the Office of Emergency Preparedness. *See* Record Vol. 5 at 79-81; Plaintiffs' Exhibit 17. These time periods were measured from the date of the disaster declaration. *See* Plaintiffs' Exhibit 17.

terms of emergency loans.[24] Congress was "concerned that administratively set deadlines ... set by the [FmHA] ... may expire, thus precluding ... farmers ... from applying for benefits under [93-237]." Conf. Rep. No. 93-363, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.Code Cong. & Ad. News 3342, 3343. Thus, Congress indicated its expectation that the FmHA would extend the deadline for seeking relief for previously declared disasters as a result of the enactment of 93-237. Conf.Rep. No. 93-363, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.Code Cong. & Ad.News 3342,

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[24] In 1972, Congress passed Public Law No. 92-385, 86 Stat. 554 (1972). Section 328 of that amendment to the Consolidated Farmers Home Administration Act of 1961 (renamed as the Consolidated Farm and Rural Development Act by Public Law No. 92-419, 86 Stat. 657 (1972)) provided for generous emergency loan benefits. "Loans under this program were curtailed by the Department of Agriculture on December 27 [1972] for budgetary reasons, due in part to the forgiveness features and low interest rates provided for by Public Law 92-385." Senate Report No. 93-85, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.Code Cong. & Ad.News 1285, 1285. In order to reinstitute the much needed emergency loan program for farmers while avoiding the excessive costs inherent in section 328, Congress repealed section 328 as amended by Public Law No. 92-385 on April 20, 1973. Pub.L. No. 93-24, 87 Stat. 24 (1973). The 1973 act stated that the generous terms of section 328 were to remain applicable to disaster designations made after January 1, 1972 and before December 27, 1972 with applicants having 18 days to apply for loans. This created a hiatus between December 27, 1972 and April 20, 1973, the date of the repealing legislation, as to what type benefits to apply during that four-month period. Congress resolved that problem by enacting Public Law No. 93-237 on January 2, 1974. Pub.L. No. 93-237, 87 Stat. 1023 (1974). Disasters during the hiatus were to be treated in accordance with the generous terms of section 328 as amended, with applicants having 90 days to apply for loans. Pub.L. No. 93-237, sec. 4, 87 Stat. 1023 (1974).

3343-44. This expectation was incorporated into the statutory language. Pub.L. No. 93-237, sec. 10(c), 87 Stat. 1023 (1974).

The materials cited above clearly demonstrate Congress' concern that the benefits of the emergency loan program be extended to all eligible farmers and that they have ample opportunity to derive benefits therefrom. The "statutory" deadline was inserted merely to insure agency adherence to congressional intent. The extension operated as a congressional demand to the Secretary of Agriculture to extend the application period.[25] To equate the "statutory" extension to a congressional termination of benefits overlooks the context in which the act was passed. No statutory authorization is required, as the government here contends, for the Secretary to extend deadlines merely because Congress inserted a deadline in a disaster relief law which originally was designed to remedy a Secretarial curtailment of loan grants. *See* Sen.Rep. No. 93-85, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.Code Cong. & Ad. News 1285. Application deadlines are normally administratively prescribed. FmHA's application period is a policy decision of that agency and expandable by the agency. We do not condone the failure of potential loan applicants to follow legitimate time restrictions set as a prerequisite to applying for governmental benefits. However, we do find that where, as here, exigent circumstances beyond the farmers' control precluded intended beneficiaries from applying for loans, the agency

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[25] "[T]he *Secretary* of Agriculture *shall extend* for ninety days after the enactment of this section the *deadline* for seeking assistance...." Pub.L. No. 93-237, sec. 10(c), 87 Stat. 1023 (1974) (emphasis supplied).

had the power to extend the loan period and the district court was within its power in ordering the agency to do so. To hold otherwise would allow FmHA to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct.[26]

The liability of the agency in this case is grounded in Congress' enactment of legislation directing the Department of Agriculture to implement the terms of the legislation, the agency's passage of implementing regulations, and the agency's failure to follow the resulting affirmatively required procedure. *See generally United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir.1970). An agency must follow its own procedure even though the procedure is more stringent than would constitutionally be required. *Morton* v. *Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270, 293 (1974). The FmHA regulations in issue are not merely statements of agency policy. The notice provisions were all promulgated in the Code of Federal Regulations and constituted rules of procedure governing emergency loan programs legislated and funded by Congress. FmHA must adhere to those rules.

We reject FmHA's contention that *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) (per curiam), controls this case. In *Schweiker* v. *Hansen*, a Social Security employee erroneously in-

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[26] We emphasize that Congress had previously invoked, and "expected" FmHA would invoke, a similar reopening remedy in 93-237 when potential beneficiaries of the program were confused as to the program's terms.

formed an inquiring claimant of her ineligibility for government benefits, resulting in her failure to file an application. A written application was a prerequisite to receiving benefits. An internal claims manual instructed agents to recommend such a filing to uncertain inquirers. Upon a later filing and receipt of the benefits in issue, plaintiff brought suit to estop the Secretary of Health and Human Services from denying complete retroactive benefits for the period in which plaintiff was eligible but had not filed a written application. The Court found estoppel inapplicable to the case since an internal instruction is not a binding regulation, plaintiff was able to correct the misrepesentation, and the estoppel would threaten the public fisc.

In *Hansen*, the claimant was negligent in failing to file an application and the agency employee was negligent both in failing to instruct her to file and in advising her of ineligibility. The present case is not an instance of a single government employee negligently failing to follow intra-office procedure and an agency nevertheless insisting on adherence to its regulations. This is not a case of a negligent plaintiff.[27] Rather, this is a case of gross failure on the part of an entire agency to follow self-imposed regulations prescribing adequate notice to potential applicants. Additionally, the error in *Hansen* was revocable. By filing an application on any subsequent day, the claimant could have corrected the error

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[27] Neither is it merely a case of an agency disseminating incorrect information, *Augusta Aviation, Inc.* v. *United States*, 671 F.2d 445 (11th Cir.1982), or delaying the processing of an application to the potential beneficiary's detriment, I.N.S. v. *Miranda*, ___ U.S. ___, 103 S.Ct. 281, 74 L.Ed.2d 12 (1983) (per curiam).

or obtained the benefits.[28] Clearly, the Florida farmers have available no such remedial option; the court must reopen the application period for availability of benefits. Perhaps the most important difference in *Hansen*, however, is the potential ramifications on the public fisc. If a person could obtain retroactive Social Security benefits by claiming to have visited the office and been told of ineligibility, the expenditure of funds on proof of claimants eligibility and employee behavior could be astounding. The district court's remedy in the present case does not threaten the public fisc. Loans, which presumably are repaid, are involved. A revolving fund exists for such loans. The remedy merely provides for a reopening of the application period; farmers must still demonstrate eligibility for relief. We must presume that the agency in the future will give sufficient notice to the public of the availability of emergency loans and that this factual situation will not recur.[29]

Having thus found the agency responsible for violating its own procedure as prescribed by law, relying on *Ruiz*, 415 U.S. at 235, 94 S.Ct at 1074, *Accardi*, 347 U.S. at 268, 74 S.Ct at 503, and *Heffner*, 420 F.2d at

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[28] Ms. Hansen did, in fact, file an application some 10 or 11 months later after which time she received the requested benefits.

[29] We do not decide the remedy issue in this case on a theory of agent misrepresentation as to the nonavailability of emergency loans to farmers. The reopening of the application period is mandated by the failure to follow affirmatively required procedure. *See generally United States* v. *Heffner*, 420 F.2d 809 (4th Cir.1970). However, although the district court made no finding of affirmative misbehavior or willful failure to notify, we note the prevalence of such neglect at every level as well as the recurrence of the lack of notice.

811-12, and having held this not to be a case of negligence as in *Hansen, Augusta Aviation*, 671 F.2d at 449, and *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), we turn to the government's final contention.

Sufficiency of Notice

Applicants claim that notwithstanding their other contention, the district court committed reversible error in concluding that the notice transmitted by FmHA regarding its emergency loan program was legally insufficient. The government argues that notice was provided in the Federal Register, the appropriateness of the notice is committed to agency discretion and hence not judicially reviewable, and FmHA otherwise complied with the applicable regulations. Appellees assert that FmHA failed to comply with specific notice requirements imposed by regulation, the public announcements were inappropriate as a matter of law, and the notice was insufficient under the due process clause of the fifth amendment.

At the time of publication of the disaster declaration,[30] the applicable regulations specifically instructed FmHA officials to notify the state and appropriate county USDA Defense Board Chairmen and other agricultural lenders in the area. 7 C.F.R. sec. 1832.3(a)(1) (1973). The regulations also provided for other "such public announcements as appear appropriate." *Id.* Pursuant to the passage of Public Law No. 93-237, the Federal Register carried notification of the extended application period and an instruction to FmHA officials

[30] The disaster declaration was published on June 5, 1973. 38 Fed.Reg. 14800 (1973).

to "inform the news media including neswpapers, radio, and television in the affected counties of the provisions of P.L. 93-237."[31]

The district court specifically found that "Defendants did not comply with regulations requiring the giving of notice to State and County USDA Defense Boards and agricultural leaders in the community." Record Vol. 3 at 104. Several exhibits indicate that FmHA requested a meeting of Defense Board personnel to acquaint them with the availability of USDA assistance to disaster victims. Plaintiffs' Exhibits 12-15; Defendants' Exhibit 5. Such a request and subsequent meeting probably suffices to meet the directive that the State Director notify the USDA Defense Board chairman. *See* 7 C.F.R. sec. 1832.3(a). Evidence exists, however, indicating that the notice given at this meeting stated only that applications should be filed by the July 30, 1973 deadline. A telegram clarifying the February 26, 1974 deadline for production losses was not received by the State Director until July 9, 1973—some time after the meeting. Plaintiffs' Exhibit 17. As to the county supervisor's duty to notify the appropriate county USDA Defense Board Chairman, several county supervisors testified that they normally maintained contact with the USDA Defense Board and conversed regarding the emergency loan program information. Record Vol. 5 at 173-74; Vol. 9 at 935-37, 967. Several county supervisors also

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[31] The notice provided that it was "being published without notice of proposed rulemaking, effective immediately, since it implements the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest." 39 Fed. Reg. 7569 (1974).

testified that they informed agricultural lenders in the area of the emergency loan program. Record Vol. 6 at 306; Vol. 9 at 936. The Chairman of the Board of Directors of the local Federal Land Bank testified, however, that he was unaware of the FmHA emergency loan program and had he been aware would have applied for a loan for his disaster related losses. Record Vol. 8 at 586-609. Area farmers also testified that they borrowed money on less favorable terms from other lenders during this time period. Record Vol. 5 at 208, 231-32; Vol. 7 at 480-81, 504-05.

While agreeing that community agricultural lenders were without sufficient notice, this intra-agency/business notice pertains only peripherally to the issue on which we affirm the district court's finding of inadequate notice.[32] FmHA failed to comply with federal regulations specifically designed to transmit notice of available emergency loan programs to the *public*. FmHA made no loans during the initial application period and only a handful during the renewed period. The press releases mandated during the reopened loan pe-

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[32] A similar, tangential notice issue involves the regulations which became effective July 30, 1973 and required county supervisors to notify immediately the governing body of the county. 38 Fed.Reg. 20244 (1973). The applicability of this regulation is contested, the government contending relevance only to future emergency loan programs. Record Vol. 5 at 88. A letter from the Assistant Administrator of Farmer Programs to the State Director, however, directed the state official to hold in abeyance "the report to the county government contact . . . until the final publishing [of new instructions] in the Federal Register of July 16, 1973." Plaintiffs' Exhibit 16; *see also* Record Vol. 5 at 85-93. After reviewing the evidence on this issue, we find that notice to the county commissions was generally lacking. *See* Record Vol. 6 at 307; Vol. 7 at 448-49, 478-79.

riod, *see* 39 Fed.Reg. 7570 (1974), consisted of one state-issued sample press release forwarded to local newspapers by county officials. Aside from receiving little publication, the sample press release merely stated that "loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974." Plaintiffs' Exhibit 21. It said nothing of the availability of a reduced interest rate, the possibility of a partial cancellation of loan principle, or the elimination of the "credit available elsewhere" requirement. The notice failed to "inform the news media . . . of the *provisions* of P.L. 93-237." 39 Fed.Reg. 7570 (1974) (emphasis supplied).

In light of FmHA's failure to comply with specific prescriptions for notice, we find it unnecessary to determine whether FmHA provided "such public announcements as appear appropriate" or whether in fact such a requirement is judicially reviewable.[33] We do note, however, the paucity of public announcement during both the initial and reopened application periods. Especially is this continual dearth of public notice noteworthy where the state director testified that his staff and he were "flabbergasted" at the lack of response to the emergency loan program. Record Vol. 8 at 658.

In contrast to the procedure invoked by FmHA for disseminating notice of emergency loan availability, the Small Business Administration (SBA) and Agricultural Statibilization and Conservation Service (ASCS) transmitted numerous detailed notices to the potential bene-

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[33] While discretionary acts are not reviewable, acts tantamount to a refusal to exercise discretion are subject to judicial review. *E.g., United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

ficiaries of their respective programs. SBA authorized at least three extensive notices listing its program's specific terms which were sent to the available area media offices, including the Jacksonville UPI and AP offices, four television stations, and numerous newspapers and radio stations. Record Vol. 10 at 1060-65. ASCS used its ongoing system of monthly newsletters to inform farmers of its emergency program and would have allowed other agencies to use this source of notice if asked. Record Vol. 7 at 540-52; Vol. 9 at 882-85. Moreover, some testimony revealed the possible existence of a "sign-up" sheet emanating from the week-long disaster meeting coordinated by OEP which could have been utilized by FmHA in contacting interested area farmers.[34] Record Vol. 9 at 1023; Vol. 10 at 1077-78.

Our review of the record convinces us that the district court was not clearly erroneous in its six pages of findings of fact and that it was correct in its ultimate conclusion of insufficient notice. *See Marable* v.

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[34] In the state of Washington during the first loan period, state and county FmHA directors issued news releases to the Associated Press, United Press International, and local newspapers. A county director also made a personal television appearance on a show broadcast to the entire disaster area. Eleven loans were granted. During the second loan period, Washington state and county FmHA officials notified the prior eleven borrowers and sent out "several" news releases. The officials also contacted unsuccessful applicants from the first loan period. One county supervisor mailed out fact sheets to all active borrowers in his office file. FmHA granted 161 additional loans. The district court found the notice inadequate but entered judgment for the government on other grounds. The court of appeals affirmed. *Emergency Disaster Loan Ass'n, Inc.* v. *Block*, 653 F.2d 1267 (9th Cir.1981).

H. Walker & Associates, 644 F.2d 390, 395 (5th Cir. Unit B 1981).[35]

Motion to Intervene

James H. Collins, Jr., a Georgia farmer, sought to intervene in this suit individually and on behalf of all others similarly situated.[36] The class Collins seeks to represent is one of all farmers in the 27 states and Puerto Rico who live in areas declared disaster areas during the same time period as the initial suit,[37] who suffered losses as a result of the natural disaster which was the subject of said designations, and who were eligible to apply for emergency disaster loans but were not notified of their eligibility to apply.[38] The district

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[35] Plaintiffs also maintain that the emergency loan program constitutes a statutory entitlement and thus a species of property entitled to fifth amendment protection. FmHA expectedly argues no deprivation of property and, alternatively, that sufficient notice was given. Since nonconstitutional issues dispose of the case in favor of plaintiffs, we decline to rule upon the constitutional issue raised by plaintiffs. We note also our rejection of appellants' argument that because notice was provided in the Federal Register, the public was on constructive notice of the loan program. In the absence of specific regulations requiring specific types of notice, as well as the specific notice provision encompassed in the Federal Register and later codified in the Code of Regulations, this argument might prevail. However, in the posture of the regulations controlling this case, it appears spurious at best.

[36] In his brief in support of motion to intervene, Collins asserts that he is entitled to intervene as a matter of right and that he qualifies for permissive intervention. Record Vol. 4 at 130. On appeal, he appears to assert only intervention of right. Brief for the Intervenors at 26-34. *See* Fed.R.Civ.P. 24.

[37] The time period involved is December 27, 1972 through April 19, 1973, inclusive.

[38] Collins' complaint alleges that only one loan was granted by FmHA in Georgia during the relevant time period notwith-

court denied Collins' motion to intervene as an individual and class plaintiff, finding the motion untimely since the case had already "proceeded to final judgment and [was then] on appeal."[39] Record Vol. 4 at 131. Collins appeals to this court.[40]

The timeliness of a motion to intervene is a question largely committed to the district court's discretion. *Howse* v. *S/V "Canada Goose I"*, 641 F.2d 317 (5th Cir. Unit B 1981). The standard of review is abuse of discretion. *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). As in the instant case, courts often are reluctant to grant leave to intervene post-judgment. "Interventions after judgment have a strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court." *United States* v. *United States Steel Corp.*, 548 F.2d 1232 (5th Cir.1977).

After careful consideration of the arguments in support of intervention, we find no abuse of discretion in the trial court's denial of leave to intervene. The appeal decided today results from a case involving extensive discovery and lengthy litigation. The testimony relates almost solely to action or inaction by state and county officials in Florida. To allow the requested intervention

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standing the designation of two disaster areas spanning 24 counties. Record Vol. 4 at 129.

[39] Actually, an appeal had not yet been filed, but a motion to stay the judgment pending appeal had. (The final judgment was entered March 5, 1981. The motion to intervene was filed April 14, 1981 and denied April 15, 1981. The Secretary of Agriculture filed a notice of appeal April 17, 1981.)

[40] *See Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 263 (5th Cir.1977) ("[W]e are authorized to decide whether the petition[] for leave to intervene [was] properly denied.")

would require exhaustive discovery to determine what information was disseminated in 27 states and Puerto Rico.[41] Since our finding of insufficient notice is limited to one specific disaster declaration, the proposed intervention would inject into this case numerous issues not heretofore considered. Collins' admonition that we enter a Rule 54 judgment in favor of the existing plaintiffs and declare plaintiffs-intervenors a subclass is not well-taken. We note, however, that these would-be intervenors are not necessarily precluded by today's ruling from filing an independent action.[42] For the foregoing reasons and because a district court's proper denial of intervention is not a final judgment, *United States* v. *United States Steel Corp.*, 548 F.2d 1232 (5th Cir.1977), we dismiss plaintiffs-intervenors' appeal for want of jurisdiction.

Accordingly, the district court order is

AFFIRMED.

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[41] The fact-finding would require ascertainment not only of what specific notice was disseminated but also what type of notice was required for disaster declarations other than Presidential designations. For example, the disaster declaration in Georgia was a Secretarial designation.

[42] Appellant maintains and Collins does not refute that Collins filed an independent action in the Southern District of Georgia in May 1981. (On November 9, 1981, *Collins* v. *Block*, No. CV 281-63, was dismissed without prejudice for statistical purposes to be restored if circumstances warrant—stayed pending decision in another case.)

APPENDIX B

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 81-5365

RONALD E. PAYNE, INDIVIDUALLY
AND ON BEHALF OF HIMSELF AND OTHERS
SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

JOHN R. BLOCK, INDIVIDUALLY AND AS
SECRETARY OF THE UNITED STATES
DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANT-APPELLANTS,

v.

JAMES J. COLLINS, MOVANT-
APPELLANT-INTERVENOR.

Appeals from the United States District
Court for the Middle District of Florida.

DEC. 19, 1983.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, HENDERSON, and CLARK, Circuit Judges.

PER CURIAM:

The petition for rehearing is considered as will be hereinafter set forth. With respect to the suggestion for rehearing en banc, no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

Rule 26), the Suggestion for Rehearing En Banc is DENIED.

In its petition for rehearing, the government contends that in our opinion in this case, 714 F.2d 1510 (11th Cir.1983), the court erred in construing a "staff instruction" as an agency "regulation" because the "instruction" was published in 39 Fed.Reg. 7569 (1974). The government urges that grave consequences may flow from our interpretation of its "instruction" as a "regulation." With admirable candor, the government points out in its petition that its arguments before the panel did not address the proper categorization of the publication in question. Government's Brief at 13.

"Agency action" contemplates a vast range of administrative functions, *see Batterton* v. *Marshall*, 648 F.2d 694, 702-03 (D.C.Cir.1980), and we recognize that proper classification of such action is often essential. *See, e.g.*, 5 U.S.C. § 553(b)(3)(A) (no requirement of advance publication and opportunity for public participation for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"). The panel's conclusion, however, was not based upon any rigid label attached to the material published on February 27, 1974 in the Federal Register. We stated that government agencies have to follow the law and their regulations but, relying upon *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 94 L.Ed. 681 (1954), and *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970), held that where the rights of individuals are affected, agencies may not depart from established procedures. Furthermore, whether those procedures are published

or not is not determinative. *See Gulf States Mfgrs.* v. *NLRB*, 579 F.2d 1298, 1308-09 (5th Cir.1978). Suffice it to say that while any language categorizing the publication as a regulation may have been overbroad, the government's label of "staff instruction" does not persuade us that the agency action in question is governed by *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). The publication in the instant case is not a "simple administrative directive to agency employees," *Kirkland Masonry, Inc.* v. *Commissioner*, 614 F.2d 532, 534 (5th Cir.1980), and is more like the action involved in *Morton* and *Gulf States*, *supra*. *Cf.* K. Davis, *Administrative Law*, § 7:4, p. 167 (1982 Supp.) (legal effect of a Treasury Department Handbook, which was not a regulation, should be determined in accordance "with the elementary idea that the government should behave responsibly"). "[L]egal characterization [of agency action] cannot be accomplished merely ... by semantic play," *Batterton*, *supra*, 648 F.2d at 703, and the government's argument is nothing more than that. Thus, our opinion about the case is unchanged.

To hold otherwise would go to the very core of our democratic government and permit agencies to ignore congressional actions and internal administrative procedures, and, in a case such as this, make loans to "favored friends of the agency," "members of the political party in power," or by some other autocratic method distribute government benefits. Since that is not our system, we cannot approve agency actions contrary to congressional or administrative mandates which frustrate benefit programs statutorily authorized and

funded by Congress. We do not suggest that in this instance the agency had any improper motives.

The panel opinion is adhered to as modified herein.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 76-605-Civ-J-WC

RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
PLAINTIFF

v.

EARL L. BUTZ, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS.

[Filed Feb. 11, 1981]

ORDER AND OPINION

This is a class action suit brought by farmers against the Farmers Home Administration (FHA), United States Department of Agriculture, claiming inadequate notice of an emergency loan program available in 1973 and 1974. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiffs contend that the notice of benefits under the federal loan program administered by the FHA was inadequate on two grounds; first, that the FHA failed to follow its own regulations regarding notice and second, that even if the regulations had been followed, the notice would have been constitutionally infirm.

Defendant FHA contends that its agents were in substantial compliance with the applicable regulations, that the notice was not constitutionally infirm and that the

FHA loan program does not rise to the level of the protected due process right.

The factual background of this case is substantially uncontroverted, and reveals that:

From April 10, 1973 through April 19, 1973 in thirteen north Florida counties there was a series of heavy rains. The counties involved were Baker, Columbia, Dixie, Gilchrist, Hamilton, Jefferson, Lafayette, Leon, Levy, Madison, Nassau, Suwannee and Wakulla. As a result of this rain some flooding, crop damage and property damage occurred.

On May 26, 1973, the President, acting pursuant to 7 U.S.C. § 1961, declared the thirteen north Florida counties a disaster area.

As part of available federal assistance to the disaster area, the FHA was authorized and funded to make emergency loans in this thirteen county area.

The initial terms of the emergency loan included 5% interest. The application period for production losses was nine months and ended on February 26, 1974. The application period for physical damage to land ended on July 30, 1973.

The FHA was required to give notice during this initial loan period in accordance with 7 C.F.R. 1832(a)(1) (1972) and FHA Instructions to County Supervisors 441.2111(A)(2). The cited section of the Code of Federal Regulations provides:

> (a) [T]he State Director [of the FHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under § 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the USDA Defense

Board Chairman and will make such public announcements as appear appropriate.

(1) Immediately upon receiving notice about the counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under § 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program.

The FHA processed no applications for and made no emergency loans in this thirteen county area during the 1973 loan period.

On January 2, 1974, the President of the United States signed P.L. 93-237, 87 Stat. 1023, which extended the application period to April 4, 1974, significantly changed the terms of available loans to provide that emergency loans would be at 1% interest with the first $5000.00 forgiven and eased some of the eligibility requirements.

The FHA regulations pertaining to emergency loans under the special authorization of P.L. 93-237 were not published in the Federal Register until February 27, 1974, 39 Fed. Reg. 7569, and provided that the County Supervisor was to prepare a list of paid up and indebted borrowers who had received emergency loans, notify each person on the list of the new terms and determine if that person was eligible for any benefit under the new terms of the loan. The regulation does not otherwise refer to notice.

The FHA made either three or four loans under the 1974 regulations. (hereafter referred to as the second loan period).

The crucial issue in this litigation is whether the notice given by the FHA complied with its own regulations. One of the key considerations in this regard is the requirement that the State Director and County Supervisors of FHA "make such public announcements as appear appropriate" concerning the emergency loans. The testimony presented by the parties showed and the Court finds as fact that:

1) After the rains leading to the disaster declaration, damage estimates were compiled by the FHA, which although later revised downward, showed, together with the testimony of several witnesses, that many of the farmers in the thirteen county area sustained some form of loss or damage from the heavy rains and flooding; that most of the farmers were aware of the purpose and function of the FHA to provide funds for relief of farmers but there were no applications processed for FHA emergency loans and no loans were granted during the first loan period.

2) A disaster relief type meeting was held in Live Oak, Florida in early June, 1973 and lasted about one week. At this meeting, which was well attended by local farmers, various government agencies set up tables at which an agency representative was stationed for the purpose of supplying information and assistance to people about the disaster relief programs available through these agencies. The FHA had such a table but it was manned by an FHA representative for only short periods of time. The majority of the time it was manned by a volunteer, not from the FHA, and who was without knowledge of or familiarity with FHA programs generally or this emergency program specifically. There was testimony that some farmers were told at the Live Oak

meeting that there was no emergency help available for farmers who had sustained crop losses but only for those who had sustained damage to their houses. This was in fact not true and FHA officials were aware of the widespread belief by farmers in this erroneous information. There was no evidence that FHA specifically undertook any planned course of action to correct this erroneous impression at the Live Oak meeting.

3) With regard to the FHA's obligation to make "such public announcements as appear appropriate" concerning the availability of emergency funds and the responsibility of the FHA to comply with the functions outlined in the job description of the County Supervisors to:

> Maintain(s) cooperative working relationships with representatives of other Federal, State, and local agencies, banks, commercial institutions, rural community leaders, etc. Represent(s) the FHA in keeping the public currently informed through the use of informational media and by maintaining close contacts with farmers, civic and other appropriate organizations and rural association groups. Consult(s) with State Office staff specialists and committeemen, as appropriate.

(Plaintiffs' Exhibit 38, FHA Instructions to County Supervisors), it appears that the local FHA offices were understaffed, underinformed, overworked and simply had limited time and resources to pursue this specific emergency program and still keep abreast of their ongoing duties, as an unfortunate result of which:

a) On June 4, 1973, the State Director of the FHA, Claude Green, issued a memorandum directing his County Supervisors to issue press releases. (Plaintiffs' Exhibit 9). No evidence is before this Court that would

support a finding that Green made any other "public" announcements. Green stated that because he was "flabergasted" at the fact that there had been no loan applicants during the first loan period, he advised one of his staff to check to see if the news media was in fact notified. Green did not indicate the results of such a check, but noted that on numerous occasions, the FHA sent out press releases and the media did not publish them. (Plaintiffs' Exhibit 29, Deposition of Claude Green).

b) The sample press release issued by Green to the County Supervisors in 1973 (Plaintiffs' Exhibit 9), contained the statement that "Loan applicants should apply prior to July 30, 1973" but omitted any reference to the February 26, 1974 deadline to apply for production losses.

c) Although the County Supervisors in the thirteen county area testified that their office routinely sent all press releases to the media on a list they kept for that purpose, they made no follow up effort to determine if any press release was actually published.

d) Although several newspapers carried information concerning the FHA program, the Monticello News appears to have been the only one that carried the press release in full. (Defendants' Exhibit 13, dated June 21, 1973), but this of course did not contain any information concerning the January, 1974 changes in the emergency loan terms. Two other newspapers covering the disaster stated that FHA would make loans at 5% if no other credit were available and stated that the local FHA office should be contacted. (Defendants' Exhibits 17 and 19). Only one newspaper contained the correct date for FHA loans due to crop loss. (Defendants' Exhibit 12D).

e) The State Director issued a memorandum and sample press release on February 28, 1974, to all County Supervisors. (Plaintiffs' Exhibit 21). The sample press release stated that loan applications would be taken under the terms of the new law (P.L. 93-237) and that "individual examination would be made of each applicant to determine the date of disaster occurrence and type of emergency loan benefits available." However, the press release did not recite the critically important new terms of the $5000.00 forgiveness or 1% interest, nor did it recite the change in the requirement that no other credit be available.

f) Although the memorandum from the State Director (Plaintiffs' Exhibit 21) also enclosed a letter to be sent to any prior recipients of emergency loans, this letter was not sent to anyone in the thirteen county area because there had been no prior emergency loans. The letter was not forwarded to anyone who had expressed interest in such loans because records were not kept of such people. No other effort was made to contact any farmer who had inquired about or who may have needed an emergency loan.

g) Although another federal agency, the Agriculture Soil Conservation Service (ASCS) apparently had an efficient ongoing system of maintaining continuous contact by monthly mailings of bulletins, newsletters and other information to farmers and residents of the involved areas, and ASCS would have willingly included information of the FHA emergency program had it been requested to do so, neither the State or County FHA offices ever made any inquiry of ASCS about such procedure.

h) There were no signs or pamphlets at FHA offices regarding emergency loans for this disaster.

i) Lack of notice problems were compounded by lack of knowledge of the correct information by FHA officials. Mr. Taylor, County Supervisor for Hamilton, Madison and Taylor counties, was unaware of the correct eligibility requirements during the first loan period, did not know when the period expired and was unaware of an extended second application period until a would be borrower brought it to his attention in February of 1974.

j) FHA officials made routine operating loans to farmers who had been affected by the disaster without ever mentioning or exploring the possibilities of their eligibility for emergency loans. Originially, when the emergency loan's terms were comparable to those of the operating loans, this may not have been significant. However, when the FHA emergency loan program changed its terms to 1% interest and $5000.00 forgiveness, with more favorable eligibility requirements, these farmers were deprived of the benefits envisioned by P.L. 93-237.

k) The extension of the loan application period to April 2, 1974 was signed by the President on January 2, 1974. The FHA county Supervisors were not notified of the extension until February 28, 1974, after two thirds of the ninety day period had already passed.

l) In many instances, County Supervisors actually visited farms which had sustained visible damage to the crops and land, discussed with the involved farmers other FHA programs which might be utilized by such farmers and made no mention of the existence of these

emergency loans and the attractive beneficial terms on which they were available.

4) Had FHA officials notified State and County USDA Defense Boards as well as other agricultural lenders of the availability of the FHA emergency loan program as is required by 7 C.F.R. § 1832(a)(1) (1972), the probability of this information becoming more widely disseminated would have substantially increased. However, no County Supervisor testified that he in fact gave such notice. All testified that they were aware of their responsibility to do so and therefore assumed that they did so. This testimony must be evaluated, however, in the light of direct testimony from the Chairman of the Board of Directors of the Federal Land Bank to the effect that even he was unaware of this FHA emergency loan program, that had he been aware of it he would have applied for a loan because of his disaster related losses, and also in the light of the direct testimony of farmers who borrowed needed funds from other agricultural lenders in the area and who were not informed by such lenders of the FHA emergency loan program. The Court therefore concludes that the Defendants did not comply with the regulations requiring the giving of notice to State and County USDA Defense Boards and agricultural lenders in the community.

Based upon the foregoing facts, the Court makes the following conclusions of law:

1) Such notice of the emergency loan program as may have been given by the FHA during the 1973-1974 emergency loan period was not sufficient to comport with the applicable regulations, 7 C.F.R. § 1832.3(a)(1) (1972). The regulations provide for specific types of notice which were not effectuated. The State Director and

County Supervisors were to "make such public announcements as appear appropriate." While this affords a degree of latitude to the FHA officials, given the circumstances of this case, such as the demonstrated need for emergency assistance, the prevelant [sic] misinformation, the lack of accurate information on the part of FHA's own officials and the major changes in terms and eligibility requirements about which inadequate notice was given, the public announcements by the FHA were not "appropriate" as a matter of law. An agency's failure to follow its own regulations is presumed to be prejudicial. *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979).

2) The constitutional issues raised by the Plaintiffs need not be and therefore are not considered because nonconstitutional issues are dispositive of the case. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Communist Party of the United States. v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Hurd v. Hodge*, 334 U.S. 24 (1948).

3) This Court is authorized to require a reopening of the FHA 1973-1974 emergency loan program. Such action is not in the nature of mandamus, but is a mandatory injunction.

4) The issue of the eligibility for FHA emergency loan benefits is not reached. It is within the province of the FHA to process all applications and apply the eligibility requirements of 7 C.F.R. § 1832 (February 27, 1974).

5) The Plaintiffs are not entitled to attorneys fees for the reasons enunciated in *Pealo v. Farmers Home Ad-*

ministration, 562 F.2d 774 (D.C. Cir. 1977). The Plaintiffs, as prevailing party, are entitled to their costs in accordance with 28 U.S.C. § 2412.

6) The class as certified by the Court's Order of 1978 has been reconsidered. The evidence and testimony at trial show that the class as previously certified is unduly restrictive in excluding from its scope those farmers who sustained loss or damage as a result of the 1973 disaster designated as M-345 other than from "flooding." It is clear that the basis for the disaster declaration was not restricted to flooding but was "as a result of severe storms and flooding, beginning on April 1, which caused serious and widespread damage to public and private property." (Plaintiffs' Exhibit 48, Presidential Documents). The class is therefore recertified as being.

> All farmers in the thirteen county area covered by the Disaster Declaration M-345 who:
>
> 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 23, 1973; and who
>
> 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration pursuant to 7 C.F.R. § 1832 (1974), and
>
> 3) who were not notified that they were eligible to apply for emergency loans.

It is therefore

ORDERED:

1. Judgment is entered for the Plaintiffs, Ronald E. Payne, et. al., and the recertified class, and against the Defendants, Secretary of Agriculture, et. al.

2. The Farmers Home Administration shall reopen the 1973-1974 emergency loan program in the thirteen

north Florida counties declared a disaster by the President on May 26, 1973. The terms and benefits applicable to this reopened program shall be those published in 7 C.F.R. § 1832 (February 1974). The application period for the reopened loan period shall be from April 15, 1981 until June 15, 1981. The Farmers Home Administration shall have from the date of this Order to April 15, 1981 within which to give notice in compliance with 7 C.F.R. § 1832.3(a)(1)(1972).

3. The Plaintiffs are awarded costs of this litigation.

DONE AND ORDERED at Jacksonville, Florida this 11th day of February, 1981.

/s/ WILLIAM J. CASTAGNA

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 76-605
Civ-J-W6

RONALD E. PAYNE AND CARBIE ELLIE, PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., DEFENDANTS.

[Filed June 7, 1982]

AMENDED FINAL JUDGMENT

For the reasons set forth in the Opinion entered on February 11, 1981, and the Order entered on that date, it is

ADJUDGED:

1. Judgment is entered for the Plaintiffs, RONALD E. PAYNE, and CARBIE ELLIE, Individually and as representatives of the recertified class, and against the Defendants, Secretary of Agriculture, et al. The recertified class is defined as:

> All farmers in the thirteen county area covered by the Disaster Declaration M-344 [sic] who:
>
> 1) suffered damage from floods or severe storms in the major natural disaster declared by the President on May 26, 1973; and who
>
> 2) were eligible to apply for emergency disaster loans administered by the Farmers Home Administration, pursuant to 7 C.F.R. § 1832 (1974); and

3) who were not notified that they were eligible to apply for emergency loans.

2. The Farmers Home Administration shall reopen the 1973-1974 emergency loan program in the thirteen north Florida counties declared a disaster by the President on May 26, 1973. The terms and benefits applicable to this reopened program shall be those published in 7 C.F.R. § 1832 (February, 1974). The application period for the reopened loan period shall be from April 15, 1981, until August 15, 1981. The Farmers Home Administration shall have from the date of this Judgment to June 1, 1981, within which to give notice in compliance with 7 C.F.R. § 1832.3(a)(1) (1972).

3. The Plaintiffs are awarded costs of this litigation.

4. Ruling on the issue of Plaintiffs' attorneys' fees is deferred.

5. The Plaintiffs and Defendants shall submit a plan for notification of class members for the Court's approval by March 18, 1981.

6. The Court reserves jurisdiction to enter such other and further Orders as may be appropriate.

7. This Amended Final Judgment amends the Final Judgment entered by the Court on March 5, 1981.

DONE and ORDERED at Tampa, Florida, this 1st day of June, 1982, *nuc pro tunc*.

/s/ WILLIAM J. CASTAGNA

UNITED STATES DISTRICT JUDGE

APPENDIX E

U.S. Department of Agriculture
Farmers Home Administration

FHA Instruction 441.5

Modifies and Supplements
FHA Ins. 441.2 and 441.4

SPECIAL EMERGENCY LOAN POLICIES AND AUTHORIZATIONS IMPLEMENTING APPLICABLE PROVISIONS OF PUBLIC LAW 93-237.

I *GENERAL:* This Instruction supplements and modifies FHA Instruction 441.2, including Supplements, and FHA Instruction 441.4, provides for making and processing Emergency (EM) loans; and provides for processing additional benefits for certain indebted and paid-up EM loan borrowers under the provisions of Public Law 93-237 signed by the President on January 2, 1974. EM loans may be approved and retroactive benefits processed as follows:

The basic objective of EM loans is to indemnify eligible farmers, ranchers, and oyster planters for losses resulting from designated disasters in order that they may continue their future farming or livestock operations with credit from other sources (including Farmers Home Administration (FHA) Operating (OL) and Farm Ownership (FO) loans). In accordance with this objective, EM loans will be limited to the actual loss sustained, except for subsequent EM loans authorized by paragraph X B.

II *RECEIVING APPLICATIONS AND VERIFYING LOSSES:*

A. State Directors will be advised by telegram of counties where EM loans are authorized under paragraphs III and V. In all counties designated on or before January 2, 1974, based on disasters occurring after December 26, 1972, the termination date for acceptance of applications based on both physical and production losses will be *April 2, 1974*, except where termination dates previously established would be shortened. Where this situation will occur, the termination date that was previously set beyond April 2, 1974, will be used. Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses). State Directors will issue an instruction setting forth this information for use in their respective states. State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237. A suggested news release for local use is attached as Exhibit C.

* * * * *

FHA Instruction 441.5
Exhibit C

SAMPLE PRESS RELEASE

UNITED STATES DEPARTMENT OF AGRICULTURE
Farmers Home Administration

Town _____, State

For Further information
call _____
Telephone: _____

EMERGENCY LOANS AVAILABLE FROM FARMERS HOME:

Farmers (and ranchers) in (name) county, (state name), who sustained production or physical losses as a result of the (type of disaster—drought, flood, hail, etc.) which struck during (indicate the period involved) may be eligible to receive an emergency loan from the Farmers Home Administration.

Those who have not received an emergency loan to assist them in recovering from their loss may apply for such a loan at the Farmers Home Administration county office at (street address), (name of town), before close of business (insert termination date supplied by State Director.)

These loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974. Individual examination will be made of each application to determine date of the disaster occurrence and type of emergency loan benefits for which the applicant is eligible.

Farm emergency loans may include funds to repair or restore damaged farm property as well as reimburse applicants for expenses already incurred for such purposes. Loans based on qualifying production losses may include funds to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock enterprises, but not to produce new crops during 1974. Payment terms depend on the purposes for which the loan is used and the applicant's payment ability. No loan may exceed the actual loss sustained.

(2-15-74) SPECIAL PN 2-15-74

APPENDIX F

39 Fed. Reg. 7569-70 (Feb. 1974)

Title 7—Agriculture

CHAPTER XVIII—
FARMERS HOME ADMINISTRATION,
DEPARTMENT OF AGRICULTURE

SUBCHAPTER C—LOANS PRIMARILY FOR PRODUCTION PURPOSES

[FHA Instruction 441.5]

PART 1832—EMERGENCY LOANS

Subpart E—Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237

Subchapter C, Loans Primarily for Production Purposes, of 7 CFR Chapter XVIII, is amended by adding to Part 1832 a new Subpart E, Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237. New subpart E supplements and modifies Subparts A and B of this part; provides for making and processing Emergency (EM) loans; and provides for processing additional benefits for certain indebted and paid-up EM loan borrowers under the provisions of Public Law 93-237 signed by the President on January 2, 1974.

In accordance with 5 U.S.C. 553, this new subpart is being published without notice of proposed rulemaking, effective immediately, since it implements the provisions of Public Law 93-237, and because a delay in implementing the provisions of the public law by this regulation would be contrary to the public interest.

The new subpart E reads as follows:

Subpart E—Special Emergency Loan Policies and Authorizations Implementing Applicable Provisions of Public Law 93-237

Sec.

1832.81 General.
1832.82 Receiving applications and verifying losses.
1832.83 Emergency loans at 1 percent interest with forgiveness benefits.
1832.84 Additional benefits for certain indebted and paid-up Emergency loan borrowers.
1832.85 Emergency loans at 5 percent interest with no forgiveness benefits.
1832.86 Loan purposes.
1832.87 Loan limitations.
1832.88 Payment terms.
1832.89 Security requirements.
1832.90 Subsequent loans.
1832.91 Relationship with other types of FHA loans.
1832.92 Handling new designations.

AUTHORITY: 7 U.S.C. 1989; 42 U.S.C. 1480; delegation of authority by the Sec. of Agri., 38 FR 14944, 14948, 7 CFR 2.23; delegation of authority by the Asst. Sec. for Rural Development, 38 FR 14944, 14952, 7 CFR 2.70.

§ 1832.81 General.

The basic objective of EM loans is to indemnify eligible farmers, ranchers, and oyster planters for losses resulting from designated disasters in order that they may continue their future farming or livestock operations with credit from other sources (including FHA

Operating and Farm Ownership loans). In accordance with this objective, EM loans will be limited to the actual loss sustained, except for subsequent EM loans authorized by § 1832.90(b).).

§ 1832.82 Receiving applications and verifying losses.

(a) State Directors will be advised by telegram of counties where EM loans are authorized under §§ 1832.83 and 1832.85. In all counties designated on or before January 23, 1974, based on disasters occurring after December 26, 1972, the termination date for acceptance of applications based on both physical and production losses will be April 2, 1974, except where termination dates previously established would be shortened. Where this situation will occur, the termination date that was previosuly set beyond April 2, 1974, will be used. Termination dates for any new counties that might be designated after January 2, 1974, will follow the current policy (60 days for physical losses and 9 months for production losses). State Directors will issue an instruction setting forth this information for use in their respective states. State Directors and County supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P.L. 93-237.

* * * * *

§ 1832.83 Emergency loans at 1 percent interest with forgiveness benefits.

(a) In all counties in which EM loans have been authorized because of a major disaster as determined by the President; a natural disaster as determined by the Secretary of Agriculture; or isolated production losses

losses as authorized by the State Director (all of which are hereinafter referred to as "disaster(s)"), where the disaster(s) occurred after December 26, 1972, but prior to April 20, 1973, the following will apply:

(1) The interest rate will be 1 percent.

(2) The principal of each EM loan will be canceled to the extent of the loss, damage, or injury resulting from the disaster not compensated for by insurance or otherwise in an amount not to exceed $5,000.

(3) Applicants will not be required to prove that they are unable to obtain their credit needs elsewhere as a test for eligibility.

(b) An applicant having qualifying losses may receive a separate principal cancellation in connection with each EM loan he might receive as a result of disaster losses occurring after December 26, 1972, but prior to April 20, 1973. However, the total amount authorized to be canceled for the same borrower either by the Small Business Administration and/or the Farmers Home Administration will not exceed $5,000 for a single disaster.

* * * * *

APPENDIX G

UNITED STATES DEPARTMENT
OF AGRICULTURE
FARMERS HOME ADMINISTRATION
Gainesville, Florida 32602

February 28, 1974
Reply to Attn of: FP

SUBJECT: M345 Disaster—Informing Potential Applicants and EM Borrowers of Public Law 93-237

TO: County Supervisors, FHA
Chiefland
Glen St. Mary
Lake City
Live Oak
Madison
Tallahassee

Assistant County Supervisor, FHA
Fernandina Beach, Florida

Attached is a sample letter and a news item prepared by the National Office. The letter is to be sent to present borrowers who obtained loans under Designation M345 which is described in Florida Instruction 441.2A, paragraph II.

The news article is to be placed in the local paper serving the county in which the disaster occurred.

/s/ John D. Carver, Jr.
For
CLAUDE L. GREEN, JR.
State Director

Enclosures
cc: DD—II
DD—III
OMAa
OMAb

* * * * *

EXHIBIT C

SAMPLE PRESS RELEASE

[Feb. 28, 1974]

UNITED STATES DEPARTMENT
OF AGRICULTURE
Farmers Home Administration
Town , State

For further information
Cali _____
Telephone: _____

EMERGENCY LOANS AVAILABLE
FROM FARMERS HOME:

Farmers (and ranchers) in (name) county, (state name), who sustained production or physical losses as a result of the (type of disaster—drought, flood, hail, etc.) which struck during (indicate the period involved) may be eligible to receive an emergency loan from the Farmers Home Administration.

Those who have not received an emergency loan to assist them in recovering from their loss may apply for such a loan at the Farmers Home Administration county office at (street address), (name of town), before close of business (insert termination date supplied by State Director.)

These loan applications will be taken under the terms of a new law (P.L. 93-237) enacted January 2, 1974. Individual examination will be made of each application to determine date of the disaster occurrence and type of emergency loan benefits for which the applicant is eligible.

Farm emergency loans may include funds to repair or restore damaged farm property as well as reimburse applicants for expenses already incurred for such purposes. Loans based on qualifying production losses may

include funds to reimburse applicants for production expenses which went into damaged or destroyed crop and livestock enterprises, but not to produce new crops during 1974. Payment terms depend on the purposes for which the loan is used and the applicant's payment ability. No loan may exceed the actual loss sustained.

APPENDIX H

1. Pub. L. No. 93-237, 87 Stat. 1024-1025, provided in pertinent part:

> SEC. 4. Notwithstanding the provisons of Public Law 93-24, the Secretary of Agriculture shall continue to exercise his authority with respect to natural disasters which occurred after December 26, 1972, but prior to April 20, 1973, in accordance with the provisions of section 5 of Public Law 92-385 as such section was in effect prior to April 20, 1973.
>
> * * * * *
>
> [SEC. 10.] (c) With regard to all disasters occurring on or after December 27, 1972, the Secretary of Agriculture shall extend for ninety days after the date of enactment of this section the deadline for seeking assistance under section 321 of the consolidated Farm and Rural Development Act as amended by this section.
>
> * * * * *

2. Pub. L. No. 93-24, 87 Stat. 24-25, provided in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsections (a), (b), (c), (d), (e), and (f) of section 328 of the Consolidated Farm and Rural Development Act, as amended by Public Law 92-385, are repealed.
>
> * * * * *
>
> SEC. 3. Subsection (b) of section 321 of the Consolidated Farm and Rural Development Act is amended by deleting said subsection in its entirety and substituting in lieu thereof:
>
> "(b) The Secretary shall make loans in any such area designated by the Secretary in accordance with subsection (a) hereof and in any area desig-

nated as a major disaster by the President pursuant to the provisions of the Disaster Relief Act of 1970, as amended, (1) to established farmers, ranchers, or oyster planters who are citizens of the United States and (2) to private domestic corporations or partnerships engaged primarily in farming, ranching, or oyster planting: *Provided*, That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan, and are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time."

SEC. 4. Section 324 of the Consolidated Farm and Rural Development Act is amended by striking out "3 per centum" and inserting in lieu thereof "5 per centum".

* * * * *

SEC. 8. Notwithstanding the repeal herein in section 5 of Public Law 92-385, and notwithstanding any other provision of law, the Secretary of Agriculture shall make loans in accordance with the provisions of section 5 of Public Law 92-385 to eligible applicants in natural disaster areas determined or designated by the Secretary of Agriculture where such determination or designation had been made after January 1, 1972 and prior to December 27, 1972. The authority to accept applications for such loans shall expire 18 days after the effective date of this Act.

3. Section 5 of Pub. L. No. 92-385, 86 Stat. 557-559 provided:

> SEC. 5. Subtitle C of the Consolidated Farmers Home Administration Act of 1961, as amended (7 U.S.C. 1961-1967), is amended by adding at the end thereof the following new section:
>
> "SEC. 328. (a) Notwithstanding any other provision of law, in the administration of this subtitle and the rural housing loan program under section 502 of title V of the Housing Act of 1949, as amended (42 U.S.C. 1472), in the case of property loss or damage or injury resulting from a major disaster as determined by the President or a natural disaster as determined by the Secretary of Agriculture which occurred after June 30, 1971, and prior to July 1, 1973, the Secretary—
>
> "(1) to the extent such loss or damage or injury is not compensated for by insurance or otherwise, (A) shall cancel the principal of the loan, except that the total amount so canceled shall not exceed the greater of (i) 50 per centum of the original principal amount of such loan but not more than $5,000, or (ii) the per centum that would be canceled of a loan of the same size by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U.S.C. 636(b)), and (B) may defer interest payments or principal payments, or both, in whole or in part, on any loan made under this section during the first three years of the term of the loan, except that any such deferred payments shall bear interest at a rate per annum to be determined by the Secretary of the Treasury under section 234 of the Disaster Relief Act of 1970 (42 U.S.C. 4453), or that established by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U.S.C.

636(b)), whichever is lower: *Provided*, That no one borrower shall be eligible to receive more than one such cancellation for any single disaster.

"(2) to the extent such loss or damage or injury is not compensated for by insurance or otherwise, may grant any loan for repair, rehabilitation, or replacement of property damaged or destroyed, without regard to whether the required loan is otherwise available from private sources: *Provided*, That in the case of any loan for refinancing, either under clause (3) of this subsection or under section 322 of this subtitle, require the borrowers to demonstrate that they are unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

"(3) may, in the case of the total destruction or substantial property damage of homes or farm service buildings and related structures and equipment, refinance any mortgage or other lien outstanding against the destroyed or damaged property if such property is to be repaired, rehabilitated, or replaced, except that the amount refinanced shall not exceed the amount of the physical loss sustained. Any such refinancing shall be subject to the provisions of clauses (1) and (2) of this subsection.

"(4) shall require the recipient of any emergency loan made under this section to execute the agreement to refinance required by section 333(c) of this title: *Provided*. That any such loan shall be reviewed at not less than two-year inter-

vals to determine if the agreement to refinance shall become applicable.

"(b) Notwithstanding any other provision of law, the provisions of subsection (a) of this section shall also apply to the administration of the programs referred to in such subsection in the case of any property loss or damage or injury, including loss or damage to agricultural crops, resulting from flood or excessive prolonged rain, drought, or other natural disaster occurring after June 30, 1971, and prior to July 1, 1973, in any area determined by the President to be a major disaster area or in any area determined by the Secretary of Agriculture to have suffered a natural disaster during such period.

"(c) Any loan made under this section shall not exceed the current cost of repairing or replacing the disaster loss or damage or injury in conformity with current codes and specifications. Any loan made under this section shall bear interest at a rate per annum to be determined by the Secretary of the Treasury under section 234 of the Disaster Relief Act of 1970 (42 U.S.C. 4453), or that established by the Small Business Administration under section 7(b) of the Small Business Act, as amended (15 U.S.C. 636(b)), whichever is lower.

"(d) In the administration of any Federal disaster loan program under the authority of this section, the age of any adult loan applicant shall not be considered in determining whether such loan should be made or the amount of such loan.

"(e) The benefits provided under this section shall be applicable to all loans qualifying hereunder, whether approved before or after the date of enactment of this section.

"(f) The President shall conduct a thorough review of existing disaster relief legislation as it re-

lates to emergency loans and housing loans administered by the Farmers Home Administration of the United States Department of Agriculture, and not later than January 31, 1973, he shall transmit to the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House of Representatives a report containing specific legislative proposals for the comprehensive revision of such legislation in order to—

"(1) adjust the benefits and the coverage available to persons affected by disasters;

"(2) improve the execution of the program by simplifying and eliminating unnecessary administrative procedures; and

"(3) prevent the misuse of benefits made available under the program."

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5365

D.C. Docket No. 76-605-CIV-WC

RONALD E. PAYNE, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

JOHN R. BLOCK, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS-APPELLANTS,

v.

JAMES J. COLLINS,
MOVANT-APPELLANT-INTERVENOR.

Appeals from the United States District
Court for the Middle District of Florida

[Filed Sept. 19, 1983

JUDGMENT

Before GODBOLD, *Chief Judge*, HENDERSON and CLARK, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants and movant-appellant-intervenor pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of the Court.

SEPTEMBER 19, 1983

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

RONALD E. PAYNE, *et al.*,

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The Respondents disagree with the question stated by the Petitioner, as equitable estoppel was specifically rejected as the basis for the decision below. Consideration of the applicability of the doctrine, if any, to government agencies is unnecessary to determine:

WHETHER A COURT MAY REMEDY A "GROSS FAILURE ON THE PART OF AN ENTIRE AGENCY" TO COMPLY WITH REGULATIONS REQUIRING SPECIFIC NOTICE OF BENEFITS TO CONGRESSIONALLY INTENDED BENEFICIARIES BY COMPELLING NOTICE UNLAWFULLY WITHHELD AND AFFORDING AN OPPORTUNITY, FOLLOWING NOTICE, FOR THOSE OBJECTIVELY ELIGIBLE TO APPLY.

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1983

NO. 83-1691

JOHN R. BLOCK, SECRETARY OF
AGRICULTURE, ET AL., PETITIONERS

v.

RONALD E. PAYNE, ET AL.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents oppose the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Secretary of Agriculture and other officials of the Farmers Home Administration (FmHA).

STATUTES AND REGULATIONS INVOLVED

The Petitioner omitted reference to 7 C.F.R. Sec. 1832(3)(a)(1)(1973), which is set forth in full in the Circuit Court Opinion, Petitioners' Appendix p. 4a.

STATEMENT

A. The Disaster of 1973

In April, 1973, heavy rains and flooding occurred in a thirteen county area of northwest Florida.[1] Officials of the Farmers Home Administration, Department of Agriculture (hereinafter "FmHA") reported[2] that, as a result of the "worst flood in twenty-five years",[3] several hundred thousand acres were flooded, with crop losses estimated between twenty-five and ninety percent. The FmHA projected agricultural losses in excess of $3,861,000.00.[4] The President declared

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1 References to "App.___" are to the Appendix filed by the Petitioner. App.1a.

2 This evaluation and reporting is required by 7 C.F.R. 1832.3(b)(1).

3 Plaintiffs' Exhibit 7.

4 Plaintiffs' Exhibits 2, 3, 4, and 5.

the area a major disaster area on May 26, 1973.[5]

B. The Initial Emergency Loan Program.

Pursuant to Section 321(b) of the Consolidated Farm and Rural Development Act,[6] the FmHA was required to make emergency loans available in areas designated as disaster areas. At the time of this Declaration, the FmHA established a nine month application period for emergency loans related to crop loss, and a sixty day application period for emergency loans relating to property damage.[7] Interest on emergency loans at this time was five

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[5] Plaintiffs' Exhibit 8A, App. 2a.

[6] 7 U. S. Code Annot. §1961(b)(1973).

[7] Plaintiffs' Exhibit 8, App. 2a.

(5%) percent per annum.[8]

The FmHA's published regulations during this initial loan application period [7 C.F.R. 1832(3)] required that FmHA officials provide specific types of notice of the availability of these benefits to eligible farmers.[9] The regulations required that the FmHA State Director:

a) notify the appropriate County Supervisors immediately and instruct them to make EM [emergency] loans available;

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[8] This interest rate was also available on "operating loans" provided by the FmHA on a non-emergency basis. Operating loans, however, had to be repaid in one year, while emergency loans could be amortized up to seven years. 7 C.F.R. 1832.10(a)(1973).

[9] The petition fails to mention this specific notice, affirmatively required by FmHA regulations. The regulation is set out in full in the Circuit Court Opinion at App. 4a.

b) notify the State U.S.D.A. Defense Board Chairman; and

c) make such public announcements as appear appropriate.

The regulations also required that the FmHA County Supervisors:

a) notify the appropriate County U.S.D.A. Defense Board Chairmen;

b) make such public announcements as appear appropriate about the availability of EM loans; and

c) explain to other agricultural lenders in the area the assistance available under the program.[10]

The trial court found that the

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[10] The Petitioners' statement, at Page 7 of their Petition, that the Regulations required FmHA's local offices "to make such public announcements as appear appropriate" only partially describes the notice required by this Regulation. Likewise, the Petitioners' reference to a later requirement that the FmHA "inform the news media...of the

FmHA violated its own mandatory regulations by failing to provide the specific notice required to be afforded to farmers eligible for emergency loans.[11]

The trial court also found that the FmHA's limited efforts to make "such public announcements as appear appropriate" were insufficient as a matter of law.[12] On June 4, 1973, a sample press release was forwarded to FmHA County Supervisors which stated that applications for emergency loans

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provisions of P.L.93-237" ignores the other notice affirmatively required by this regulation. The Circuit Court characterized the FmHA's noncompliance as a "gross failure on the part of an entire agency to follow self imposed regulations prescribing adequate notice to potential applicants." App. 17a.

11 App. 39a-40a, App. 20a-21a.

12 App. 40a.

should be submitted prior to July 30, 1973.[13] The nine month application period for crop losses was not mentioned in the press release.[14]

The State Director made no other "public announcements".[15] The press release was routinely forwarded to the local media,[16] but no effort was made to determine if, in fact, the press release was published.[17]

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[13] Plaintiffs' Exhibit 9, App. 35a-36a.

[14] This omission is significant because those farmers who might suffer crop losses would not be able to determine the extent of those losses until August or later, depending on harvest time. Tr. 425-26.

[15] App. 35a-36a.

[16] App. 36a., Tr. 304, 305, 941, 982 and 1036.

[17] Only one article, Defendants' Exhibit 13, was introduced at the trial as having been published through the Defendants' efforts to "make such public announcements as

In June, 1973, the President's Office of Emergency Preparedness conducted a one week public meeting at Live Oak, Florida. Various agencies, including the FmHA, were invited to attend and explain to the public the types of disaster relief available to effected persons. The FmHA had a table at the Live Oak meeting but for a majority of the time it was manned by a volunteer, not employed by the FmHA, who had no knowledge of FmHA programs generally or this emergency loan program specifically.[18]

Several Plaintiffs, and many other local farmers, attended to learn if relief was available for farmers who had suffered crop losses. They were

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appear appropriate" through the use of press releases or other media contacts. App. 36a.

[18] App. 34a-35a.

told "if you are a farmer, you don't qualify. This isn't for farmers."[19] This was, in fact, not true. FmHA officials were aware of the wide-spread belief by many farmers in this erroneous information.[20] The FmHA took no action to correct this erroneous information.

During the first application period, no applications for emergency loans were received.[21] Many FmHA County Supervisors testified that farmers were "switched" from emergency loans to operating loans during this

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[19] Tr. 589; see also Tr. 267-268, 228, 615. App. 34a-35a.

[20] Tr. 993-995, App. 34a-35a.

[21] Claude Greene, State Director of the FmHA for Florida, testified that he was "flabbergasted" at the lack of response to the emergency loan program. App. 36a.

period.[22]

C. The 1974 modification of the emergency loan program.[23]

On January 2, 1974, the President

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[22] App. 38a. The "substitution" of operating loans for emergency loans by FmHA County Supervisors was detrimental in two respects. First, operating loans had to be repaid in one year, as contrasted to seven. More importantly, had emergency loans been made to qualified farmers, they would have received letter notice of the more advantageous provisions of Public Law 93-237. See 7 C.F.R. 1832.84(d) and (e), Plaintiffs' Exhibit 41.

[23] On July 30, 1973, the FmHA amended its regulations dealing with the notice required for emergency loans, to require that "immediately upon receiving notice about counties under his jurisdiction" the County Supervisor should "notify the governing body of the county..." in addition to notifying County U.S.D.A. Defense Board Chairmen, the other agricultural lenders, and the requirement that the County Supervisor "make such public announcements as appear to be appropriate". App. 21a. The FmHA stipulated that they failed to give this notice. Stipulation filed January 27, 1981.

signed Public Law No. 93-237.[24] By this amendment to the Small Business Act, Congress made more attractive disaster relief available for qualifying farmers who had suffered crop and production losses as a result of disasters occurring between December, 1972, and April, 1973. These changes authorized a maximum interest rate of 1%, as contrasted to the previous 5% interest rate on emergency loans, added a $5,000 "forgiveness" feature, and eliminated the requirement that applicants be "unable to obtain... credit elsewhere" in order to qualify for an emergency loan.[25] Congress also required that the Secretary extend the time for accepting applications for

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[24] 87 Stat. 1023-1025 (1974).

[25] Pub.L.No. 93-237, Section 4, 87 Stat. 1024, (January 2, 1974) App. 56a.

these benefits in order to provide notice to eligible farmers.[26]

FmHA officials failed to notify the State and local FmHA offices of the existence of these benefits or the re-opened application period until more than two-thirds of the period had already passed.[27] On February 27, 1974, the FmHA published an amendment to 7 C.F.R. Section 1832 which implemented the changes contained in Public Law 93-237. The amended regulations required that notice be provided to eligible farmers by state and county FmHA officials by requiring that they "inform the news media

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[26] Pub.L.No. 93-237, Section 10(c), App. 56a.

[27] A local FmHA official testified that his first notice of the new application period came from RONALD PAYNE. Tr. 427. This was confirmed by O.R. Hammerick, County Agent. Tr. 576.

including newspaper, radio and television in the effected counties of the provisions of P.L. 93-237."[28]

FmHA regulations also required that the County FmHA Supervisors prepare a list of borrowers who received EM loans and mail individual letter notices of the new application period to them.[29] Since there were no emergency loan applications filed during the first application period, these letters were provided to the County FmHA Supervisors but sent to no one.[30] On February 28, 1974, the FmHA State Director issued a sample press

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[28] Plaintiffs' Exhibit 41, App. 51a.

[29] Plaintiffs' Exhibit 41, 7 C.F.R. 1832.84(d) and (e). App. 6a-7a.

[30] Tr. 144. App. 7a. No effort was undertaken to send letters to those farmers who, although qualified for emergency loans earlier, had been "switched" to operating loans. App. 37a.

release to all County Supervisors.[31] This press release stated that loan applications would be taken under the terms of a new law, but did not recite the critically important "provisions of P.L. 93-237" concerning the $5,000 "forgiveness", the 1% rate of interest, or the fact that the availability of other credit no longer precluded participation in the program.[32] Once again, the press release was routinely sent to the media, but received little publication.[33] FmHA officials made no

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[31] Plaintiffs' Exhibit 21, Trial Court Opinion, App. 37a.

[32] Id.

[33] Only two newspaper articles were introduced at trial as having been actually published, Defendants' Exhibits 11a and 11b. Neither of these articles contained the critical information concerning "the provisions of Public Law 93-237". 7 C.F.R. 1832.82(a). App. 7a.

other efforts to inform eligible farmers of the existence of, or the favorable terms contained in, Public Law 93-237.[34]

No efforts were made to contact farmers who had inquired about, or may have needed, an emergency loan, nor was there any effort to contact borrowers who had inquired about emergency loans and were "switched" to operating loans at now considerably less advantageous terms and rates.[35]

During both first and second application periods, FmHA County

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[34] Id. Specifically, there was no notification of the county governing body; no notification of other agricultural lenders; and no notification of the U.S.D.A. Defense Board chairman.

[35] App. 37a. Compare the notice provided by the SBA and ASCS, sister agencies of the FmHA, during this disaster program. App. 22a-23a.

Supervisors sent routine mailings to farmers who had existing loans. No notice of the availability of emergency loans was included.[36]

Further, the FmHA was aware that a "sign in sheet" had been maintained at the Live Oak meeting,[37] and was aware of the wide-spread, albeit erroneous, belief that no disaster relief was available for farmers. No effort was made to notify those farmers who had "signed up" at Live Oak.[38]

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[36] Tr. 943-945, Tr. 1040, 1041, Tr. 837, 838. See also Tr. 719-20.

[37] Tr. 1023-1024. App. 23a.

[38] Tr. 1023-24. Only four loans were granted by the FmHA for this disaster. [App.33a]. Three loans were the direct result of RONALD PAYNE'S insistence to effected farmers that emergency relief was, in fact, available. [Tr. 762-65]. Mr. PAYNE attempted to notify other farmers, but they did not believe that assistance was available, "because [they] didn't hear it from other sourves." [Tr. 762-63].

ARGUMENT

I

Equitable estoppel was neither plead nor relied upon by the Plaintiffs in, nor was it considered or applied by, either the trial court or the Circuit Court.[39] The trial court simply compelled, by mandatory injunction, specific notice by the FmHA of benefits to which the Plaintiffs were objectively entitled and allowed an opportunity for the Plaintiffs to apply for these benefits following the notice required by FmHA regulations. This relief was necessary and available under 5 USC §706 to provide "agency

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[39] The Circuit Court specifically declined to base its decision on misrepresentation by the FmHA, holding that the District Court remedy was "mandated by the [FmHA's] failure to follow affirmatively required procedure." App. 18a., citing United States v. Heffner, 420 F.2d 809 (4th Cir. 1970).

action which [had been] unlawfully withheld...."

Unlike Heckler v. Community Health Services, 52 U.S. Law Weekly 4621 (Opinion dated May 21, 1984), the Plaintiffs here will not receive that which they "should never have received in the first place." Id. at 4624. Compare Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed 10 (1947). Nor will the relief afforded threaten the public fisc. Compare Federal Crop Insurance Corp. v. Merrill, supra. Relief is afforded only to farmers objectively qualified to apply for benefits, and who did not apply because they were not notified of the existence of disaster relief and their ability to apply for it.[40]

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[40] App. 41a. The FmHA has never argued that the funds appropriated by

This was not an isolated, oral violation of internal procedures, the consequences of which a negligent Plaintiff could avoid, at least in large part, by complying with valid agency regulations at some subsequent time.[41] Here, there was a "gross failure on the part of an entire agency" to provide notice which only that agency could provide.[42] These Plaintiffs certainly were not negligent in believing repeated assurances by FmHA officials that disaster relief was

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Congress are no longer available for emergency loans. They argue that because no applications were filed, they have no authority to consider applications after the deadline. This interpretation is directly contrary to Congress' intent. See generally App. 14a-15a.

[41] Compare Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)(per curiam).

[42] Compare Heckler, supra.

not available for farmers.[43] These farmers, having been deprived of specific notice required by FmHA regulations, and having been told by the FmHA on numerous occasions that no relief was available, could not correct their failure to apply at all unless notice is compelled and the application period is extended.

The Petitioners argument that the Court "is powerless in the public interest to relax the time provisions of its procedural rules...is not worthy of serious consideration."[44] Health Systems Agency of Oklahoma, Inc. v.

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43 Tr. 206, 207, 228, 267-68, 588, 615, 683-85.

44 NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953). See also American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970).

Norman, 589 F.2d 486 (10th Cir. 1978).

While we do not concede that equitable estoppel would not be appropriate where the court finds a gross failure of an entire agency to provide specific notice required by valid regulations, resulting in objectively eligible beneficiaries complete inability to apply for benefits intended by Congress, the applicability of the doctrine was not the basis for the opinions below and need not be decided by this Court. Heckler, supra. None of this Court's prior decisions dealing with equitable estoppel are inconsistent with the relief afforded here.

II

The FmHA determined, by valid, binding regulations that it had a duty to "inform the public of the privileges and benefits available" through specific types of notice. The Court below simply held that "before the [agency] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own...procedures." Morton v. Ruiz, 415 U.S. 199, 235, 39 L.Ed.2d 270, 294, 94 S.Ct. 1055 (1974).[45] This holding is consistent with this Court's repeated holdings that an administrative agency must comply with its own procedures before

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[45] The agency itself determined that "a delay in implementing the provisions of the public law by [its] regulation[s] would be contrary to the public interest." 39 Fed. Reg. 7569 (1974). App. 49a.

significant rights are terminated. Compare United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954), (violation of procedural regulations in deportation proceeding); Service v. Dulles, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1959) and Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959) (violation of procedural regulations in employee dismissal). See also Yellin v. United States, 374 U.S. 109, 10 L.Ed.2d 778, 83 S.Ct. 1828 (1963).

It is clear that agency action which frustrates the congressional policy which underlies a statute is invalid. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-46, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); NLRB v. Brown, 380

U.S. 278, 291, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 715 (8th Cir. 1979).

The Circuit Court's review of the Congressional history[46] amply demonstrates that the Congress acted out of "concern that administratively set deadlines...set by the [FmHA]...may expire, thus precluding...farmers... from applying for benefits...."[47] Congress clearly intended "that the benefits of the emergency loan program be extended to all eligible farmers and that they have ample opportunity to

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[46] Conf. Rep. No. 93-363, 93d. Cong., 1st Sess. 2, reprinted in 1973 US Code. Cong. & Add. News 3342, 3343. See generally App. 7a-9a, 13a-16a.

[47] App. 14a.

[48] App. 15a.

derive benefits therefrom."[48]

This clear congressional intent was violated when the agency withheld compliance with regulations "specifically designed to transmit notice of available emergency loan programs to the public."[49] This "gross failure on the part of an entire agency"[50] to comply with its own regulations was "an apparent attempt to comply with executive budgetary goals," contrary to the clear intent of Congress.[51]

Where a federal agency refuses to act in disregard of its legal duty to act, 5 U.S.C. § 706(1) empowers the

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[49] App. 21a. [emphasis by the Court].

[50] App. 17a.

[51] App. 9a. Compare Sioux Valley Empire Electric Association, Inc. v. Butz, 504 F.2d 168 (8th Cir. 1974), Berends v. Butz, 357 F.Supp. 143 (D. Minn. 1973).

federal courts to provide appropriate relief.[52] See e.g. EEOC v. Liberty Loan Corporation, 584 F.2d 853, 856 (8th Cir. 1978). Under both general equitable powers and powers granted under the Administrative Procedures Act, courts can insure that statutory rights are not denied by agency inaction. See e.g. Nader v. FCC, 172 U.S. App. D.C. 1, 520 F.2d 182 (1975); Environmental Defense Fund, Inc. v. Harden, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970); Deering Millikin, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); American Broadcasting

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[52] Petitioner, for the first time, argues in its Petition, at p. 18, that this case is not one for judicial review under the 5 USC § 702. The Complaint sought relief under the APA. No issue as to failure to exhaust administrative review was raised by the defendants in, nor was it considered by, either the trial court or the Circuit Court.

Company v. FCC, 191 F.2d 492 (DC Cir. 1951); Caswell v. Califano, 583 F.2d 9, 15-16 (1st Cir. 1978).

CONCLUSION

The trial court properly "compel[led] agency action unlawfully withheld" by mandatory injunction pursuant to 5 U.S.C. §706(1); required the FmHA to provide notice to eligible farmers; and afforded an opportunity to apply for benefits to which they were entitled.[53] Neither the prior holdings of this Court nor the congressional intent of Public Law 93-237 supports what the circuit court characterized as the FmHA's "absurd position...that it can disobey a congressional mandate to make loans available to eligible farmers..."[54] with impunity.

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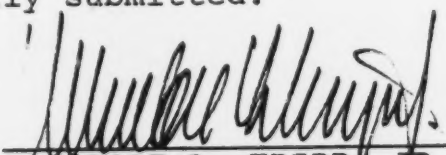
[53] "To hold otherwise would allow [the agency] to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct." App. 16a.

[54] App. 11a.

The circuit court opinion is fully consistent with, and required by, prior holdings of this court including Morton v. Ruiz, supra, and United States ex rel. Accardi v. Shaughnessy, supra. The petition for certiorari should be denied.

Respectfully submitted.



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v.

RONALD E. PAYNE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents claim (Br. in Opp. 17, 21) that the decision of the court of appeals does not rest upon equitable estoppel and that it instead finds an independent basis in the Administrative Procedure Act, 5 U.S.C. 702 and 706, and the associated doctrine that federal agencies must abide by their own regulations (Br. in Opp. 17-18, 22-23, 25-26). These assertions are incorrect.

a. First, respondents' claims are inconsistent with the court of appeals' opinion. As we have explained in our Petition (at 17-18), the court of appeals purported to rely upon the APA and the obligation of government agencies to follow their regulations. Unlike respondents, however, the court of appeals also acknowledged — at least nominally — the relevance of this Court's decisions rejecting the application of equitable estoppel to limit the government's ability to enforce the law. Thus, rather than simply close its

eyes to those decisions, as respondents do (see Br. in Opp. 21), the court of appeals addressed the government's argument that *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), is controlling here, seeking to distinguish that case on several factual grounds (Pet. App. 16a-19a).[1] Nowhere did the court of appeals suggest that the basis assigned for its decision made it unnecessary to comply with this Court's estoppel rulings. Nor did the court below suggest that the effect of its decision was anything other than to estop the government from enforcing what it acknowledged to be "legitimate time restrictions set as a prerequisite to applying for governmental benefits" (Pet. App. 15a). Rather, the court below insisted that its decision was consistent with this Court's decisions limiting estoppel. There accordingly is no merit to respondents' contention (Br. in Opp. 21) that this case does not present any question as to the availability of equitable estoppel against the United States.

We note, moreover, that the grounds upon which the court of appeals undertook to distinguish *Hansen* are untenable, for the reasons stated in our Petition (at 13-17). Respondents have made no effort to answer our arguments in that connection. The decision below plainly cannot be reconciled with *Hansen*.

b. Even if the court of appeals had not signaled its understanding that its decision amounted to invocation of estoppel against the United States, that conclusion would be inescapable. This Court's teaching that the United States "may not be estopped on the same terms as any other

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[1]The court of appeals also undertook to distinguish (albeit on insubstantial factual grounds) *INS* v. *Miranda*, 459 U.S. 14 (1982), another of this Court's estoppel decisions (Pet. App. 17a n.27). Respondents' suggestion (Br. in Opp. 17) that the government did not argue or that the court of appeals did not consider the estoppel issue raised here is accordingly frivolous. See also Gov't C.A. Br. 17-23.

litigant" (*Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 8) cannot be circumvented merely by manipulating doctrinal labels. Respondents' exercise in semantics cannot conceal the fact that the relief awarded by the courts below — reopening of an expired emergency loan program in contravention of an explicit deadline having the force of law, because of the responsible agency's failure sufficiently to publicize the program — entails application of equitable estoppel as this Court has most recently defined that term: "[w]hen the Government is unable to enforce the law because [of] the conduct of its agents" (*Community Health Services*, slip op. 8). The court of appeals' decision plainly estops the FmHA from denying respondents' loan applications on the grounds that they are more than a decade out-of-time.

2. a. In any event, the relief awarded in this case is not authorized by the APA or the principles of administrative law upon which respondents rely. Without pausing to address our arguments (Pet. 19-20), respondents assert (Br. in Opp. 17-18, 25-26) that overriding of the applicable deadline for filing a loan application with FmHA constitutes "comp[ulsion] of agency action unlawfully withheld" within the meaning of 5 U.S.C. 706(1). They thus ignore the fact that the only agency action the court of appeals determined to have been improperly withheld here was the dissemination of a sufficiently informative press release.[2] The reopening of an entire expired loan program in violation of the application deadline established by law cannot accurately be characterized as simply compelling the agency to remedy a publicity defect.

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[2]Contrary to respondents' implication (Br. in Opp. 19-20), the court of appeals did not find that FmHA officials incorrectly advised members of respondents' class that emergency loans were unavailable to them. Indeed, respondents acknowledge, elsewhere in their brief (at 17 n.39), that the court of appeals "specifically declined to base its decision on misrepresentation by the FmHA * * *."

Respondents rely (Br. in Opp. 22-23) upon this Court's decisions recognizing that agency action taken in disregard of an agency's own procedural regulations may be set aside upon judicial review. But — again ignoring our argument (see Pet. 18-19) — respondents do not even attempt to show that any of these decisions irrevocably conferred upon a private party substantive benefits for which that person was ineligible as a matter of law.[3] Of course, that is precisely what the court of appeals did in this case.

b. The court of appeals' decision thus finds no support in the administrative law doctrines invoked by respondents. Indeed, that is the necessary implication of *Hansen* itself, a suit for judicial review of administrative action. See 450 U.S. at 787 & n.3.[4] Again, in *INS* v. *Miranda*, 459 U.S. 14, 16 (1982), this Court enforced its strictures against application of equitable estoppel in a case involving agency action subject to judicial review. Most recently, this Court's decision in *Community Health Services* confirms that the

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[3]Respondents observe (Br. in Opp. 17 n.39) that the court of appeals relied upon *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970). That decision, however, is directly contrary to this Court's subsequent decision in *United States* v. *Caceres*, 440 U.S. 741 (1979). *Caceres* itself confirms that an agency's obligation to abide by its own regulations does not override doctrines that limit the availability of particular remedies to individual litigants that are intended to avoid imposing unwarranted burdens and costs upon the public as a whole. 440 U.S. at 753-755.

[4]If, as respondents urge, the APA (or analogous statutory provisions for judicial review of administrative action) renders inapplicable this Court's decisions rejecting application of equitable estoppel against the United States, *Hansen* itself should have been decided differently. On respondents' theory, Hansen should have been granted unlimited retroactive Social Security benefits, notwithstanding the statutory limit on the reach of such benefits, as a means of "compel[ling] agency action unlawfully withheld" — *i.e.*, to fulfill the requirement of the Social Security Claims Manual that its employees advise applicants to file a written application for benefits even if their eligibility is doubted. See Pet. 21. Respondents do not answer this argument.

estoppel rulings upon which we rely may not be circumvented by casting a claim as one for judicial review of administrative action. See slip op. 6.

3. In *Community Health Services* the Court explained (slip op. 8 (footnote omitted)):

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well-settled that the Government may not be estopped on the same terms as any other litigant.

While the Court found it unnecessary to decide whether such an estoppel is ever permissible, it described as "substantial" the argument that no exception should be recognized to the general rule against estoppel (slip op. 8). And the Court made clear that in order to protect "the public interest in ensuring that the Government can enforce the law" (*ibid.*), a heavy burden should be imposed on a private party advocating that an exception be recognized (slip op. 9). The court of appeals' analysis does not comport with this standard and does not reflect proper regard for the "interest of the citizenry as a whole in obedience to the rule of law" (slip op. 8).

In addition, *Community Health Services* teaches that, at a minimum, a private party seeking to estop the United States must demonstrate with clarity "that the traditional elements of an estoppel are present" (slip op. 9). Those elements include justifiable detrimental reliance upon materially misleading representations or conduct by the party sought to be estopped. Slip op. 7. But *Community Health Services* makes clear that any claim of entitlement to public benefits that is at variance with published agency regulations is an unreasonable one. Slip op. 11-14. Because FmHA's regulations, which fully described the terms of the

emergency loan program, unambiguously fixed the applicable loan application deadline, any belief that tardy applications would be accepted was unreasonable. Furthermore, *Community Health Services* makes clear (slip op. 9-11) that the doctrine of equitable estoppel may not be employed to exact windfall benefits from the government. As explained in the Petition (at 21-22), the decision of the court of appeals will confer such a windfall upon respondents by effectively making a $5,000 grant and a 1% loan available to members of the class, without regard to the existence of current need or the purposes that Congress intended to serve through the enactment of the emergency loan program a decade ago.

For these reasons, and because *Community Health Services* emphasizes that limitations on equitable estoppel must be taken into account by the courts in framing relief upon review of administrative action, it would be appropriate to vacate the judgment of the court of appeals and to remand the case for consideration in light of *Community Health Services*. See *Walters* v. *Home Savings & Loan Ass'n*, No. 83-277 (June 4, 1984).

Respectfully submitted.

REX E. LEE
Solicitor General

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